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REFORMING THE CRIMINAL JUSTICE SYSTEM

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Growing Old in China
by JAN S. PRYBYLA, Pennsylvania State University

Current History

JULY/AUGUST, 1976 VOL. 71, NO. 418

In this concluding issue in our two-part symposium, seven specialists evaluate proposals for reform of the American system of justice, including suggestions for penal reform, changes in the criminal justice process, and comprehensive gun control legislation. Writing of the aims of imprisonment, our introductory article explores prisons and their aims. ". . . the offender should be punished as severely as he deserves, in view of the seriousness of his crime. . . . Deserved sentences are those that are proportionate in their severity to the seriousness of the crime. . . ."

The Aims of Imprisonment

By Andrew von Hirsch

Associate Professor, Graduate School of Criminal Justice, Rutgers University

When, and for what purpose, should a convicted offender be imprisoned? Two current developments have made this question acute.

First, we have learned that imprisonment is a far harsher sanction than was once supposed. Prison walls formerly hid life inside from public scrutiny. During the last three decades, however, sociologists have documented prisons' social structure, courts have inquired into institutional conditions, and inmates have made their grievances heard. We know now that living conditions are awful in most institutions—and that the loss of liberty itself is a grievous deprivation.[1] The former warden William G. Nagel, after conducting a nationwide survey of new prisons, has noted that even in the most "modern" facilities,

> [T]he prison experience is corrosive for those who guard and those who are guarded. This reality is not essentially the product of good or bad architecture. It is the inevitable product of a process that holds troubled people together in a closed and limited space, depriving them of their freedom, their families, and their humanity while expecting a relatively few employees to guard, control, punish, and redeem them.[2]

Second, we are beginning to question the traditional rationale for imprisoning. The purpose of confinement, it was conventionally supposed, was to rehabilitate the offender and restrain him if he were predictably dangerous. To accomplish these ends, sentencing judges and parole officials were given wide discretion to suit the sentence to the offender's need for treatment and the degree of risk he posed. In a robbery case, for example, a judge has typically been free to impose from as little as a suspended sentence to as much as five or ten years' imprisonment, depending on what he thought would best protect the public or rehabilitate the defendant.[3]

But do judges and parole officials really know what will rehabilitate criminals? It is doubtful that anybody knows. A wide variety of correctional treatment programs have been tried and evaluated, ranging from psychiatric counseling to Skinnerian behavior modification techniques. The results have been largely negative. Not only do the prison-based treatment programs fail, but "community-based" programs outside prison have usually been disappointing.[4]

[1] See Gresham M. Sykes, *The Society of Captives* (Princeton: Princeton University Press, 1958); Erving Goffman, *Asylums* (Garden City, N.Y.: Anchor Books, 1961); Jessica Mitford, *Kind and Usual Punishment* (New York: Knopf, 1973); David J. Rothman, "Decarcerating Prisoners and Patients," vol. 1, *Civil Liberties Review*, (1973), p. 8.

[2] William G. Nagel, *The New Red Barn: A Critical Look at The American Prison* (New York: Walker & Co., 1973), p. 148.

[3] See Council of Judges, National Council on Crime and Delinquency, *Model Sentencing Act* (1963), reprinted in vol. 9, *Crime and Delinquency* (1963), p. 339; American Correctional Association, "Declaration of Principles" in *Manual of Correctional Standards* (Washington, D.C.: American Correctional Association, 1969). For a critique of the traditional rationals, see Andrew von Hirsch, *Doing Justice: The Choice of Punishments*, Report of the Committee for the Study of Incarceration (New York: Hill and Wang, 1976), pp. 9–32; Rothman, *op. cit.*

[4] James O. Robison and Gerald Smith, "The Effectiveness of Correctional Programs," vol. 17, *Crime and Delinquency* (1971), p. 67; Robert Martinson, "What Works?—Questions and Answers About Prison Reform," *The Public Interest* (Spring, 1974), p. 22; Douglas Lipton, Robert

Can we identify accurately which individuals are dangerous? That is also questionable. When forecasting serious crimes, there is a strong tendency to overpredict: many or most of those identified as potential recidivists will be "false positives"—persons mistakenly predicted to be dangerous.[5]

And what of the fairness of giving sentencing judges and parole officials such broad discretion? Gross disparities in sentences have resulted.[6] Sentencers whose decisions are unchecked by general standards, we have learned, decide similar cases differently.

Such doubts about the traditional ideology have stimulated a search for alternative conceptions. In this article, I shall examine three alternative models that now are attracting penologists' attention: a model that relies on isolating offenders from society; one that is based on general deterrence; and finally, one that employs the moral notion of "just deserts."[7]

Martinson and Judith Wilks, *Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (New York: Praeger, 1975); Paul Lerman, *Community Treatment and Social Control* (Chicago: University of Chicago Press, 1975).

[5] Alan M. Dershowitz, "The Law of Dangerousness: Some Fictions About Predictions," vol. 23, *J. Legal Ed.* (1970), p. 24; Andrew von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," vol. 21, Buffalo L. Rev. (1972), p. 717; Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974); von Hirsch, *Doing Justice,* ch. 3.

[6] Marvin E. Frankel, *Criminal Sentences* (New York: Hill and Wang, 1972); Willard Gaylin, *Partial Justice* (New York: Knopf, 1974); Anthony Partridge and William B. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (Washington, D.C.: Federal Judicial Center, 1974); von Hirsch, *Doing Justice,* ch. 4.

[7] In addition to these more or less conceptually "pure" models, hybrid models have been proposed; see, e.g., Norval Morris, *op. cit.,* which relies on both deterrence and desert in setting the sentence.

[8] President Ford's Message to Congress on Crime Control, June 19, 1975; Senator Edward M. Kennedy, Statement introducing S. 2698, 94th Cong., 1st Sess. (1975), vol. 174, *Cong. Record* (daily ed., November 20, 1975).

[9] James Q. Wilson, *Thinking About Crime* (New York: Basic Books, 1975).

[10] For a fuller critique of the Wilson arguments, see Andrew von Hirsch, "Giving Criminals Their Just Deserts," *The Civil Liberties Review,* April/May, 1976.

[11] *Ibid.*

[12] Alfred Blumstein and Jacqueline Cohen, "A Theory of the Stability of Punishment," vol. 64, *Journal of Criminal Law and Criminology* (1973), p. 198.

[13] Steve Gettinger, "U.S. Prison Population Hits All-Time High," *Corrections Magazine* (March, 1976), p. 9.

[14] U.S. District Court Judge Frank M. Johnson ruled last year that conditions of overcrowding in the Alabama prison system violated the "cruel and unusual punishment" and "due process" clauses of the Constitution, and issued standards for minimum living space and minimum living conditions that the Alabama system must comply with. He also banned acceptance of more prisoners until the prison population was reduced to its rated capacity. "Alabama Under Strict Order to Upgrade Entire Prison System," *Corrections Magazine,* March, 1976, pp. 18–19.

THE INCAPACITATION MODEL

Whatever its other drawbacks, imprisonment at least isolates offenders from the community. And while we may not be able to forecast accurately which individual offenders will recidivate, we do know that a substantial number of convicts return to crime. So why not automatically imprison convicted felons for a prescribed time, simply to separate them from society? Why not enact mandatory minimum prison sentences to make sure they are incapacitated, as President Gerald Ford and Senator Edward Kennedy (D., Mass.) have been urging?[8]

The argument in favor of this incapacitative approach was best stated by James Q. Wilson in his recent book, *Thinking About Crime.*[9] Wilson starts with the hypothesis that most serious crimes are committed by repeaters—persons who, because of the many crimes they perpetrate, sooner or later are caught and convicted. While a few of these persons now serve very long sentences, many others are put on probation and thus can return to crime. Were prison sentences—even those of modest length—invariably imposed in such cases, the incapacitative payoff would be substantial. Wilson contends that most of those responsible for serious crimes would eventually be taken out of circulation for at least a portion of their criminal careers. The crime of robbery, he suggests, might thus be reduced by 20 percent or more. Nor would one have to try to predict which individuals would offend: the incapacitative payoff comes from the fact that conviction for specified crimes would automatically result in a prison sentence.

Yet this approach has problems.[10] One problem is our limited knowledge of incapacitating effects. Wilson's strategy would succeed only if the "habitual" offenders whom he proposes to isolate are responsible not only for the crimes for which they are convicted, but for the bulk of unsolved crimes as well. Yet we still understand very little about who commits unsolved crimes. It is necessary to assume, also, that if such "habitual" criminals were taken out of circulation, their unlawful activities would not be taken over in large part by newly recruited criminals. Again, we know little about the substitutability of criminal roles.[11]

Cost is another problem. Prisons are expensive to run and still more so to build. In past years, the rate at which persons were sent to prison was relatively stable.[12] If we rely on isolating offenders, however, the prison population would rise sharply—as it already has in many states that are jailing a large percentage of convicted criminals.[13] This influx of new prisoners could not be accommodated in existing facilities—except with intolerable overcrowding which several courts are now beginning to prohibit as unconstitutional.[14] An ambitious program of

son construction would have to be undertaken—
enormous expense, since each space for a new
nate costs about $30,000 to $50,000 to build.[15]
ven their other fiscal difficulties, few jurisdictions
ı afford an investment of this magnitude in new
sons.

Fairness is another question. Which offenders
ɔuld be incapacitated by being sent to prison? To
prison those who perpetrate acts of violence or
ıer grave offenses appeals to our sense of justice,
:ause they seem to deserve it. But what of those
ıo commit crimes that are not so serious, like non-
lent thefts of personal belongings? Imprisoning
:h individuals might be useful as an incapacitant—
ɔecially as lesser offenders are apt to have par-
ularly high recidivism rates. But is it just to im-
se the severe punishment of imprisonment for such
ser crimes?[16]

This problem of fairness is highlighted in manda-
y minimum sentence proposals like President
rd's and Senator Kennedy's. If the chief aim is
incapacitate, the mandatory minimum prison sen-
ıce seems sensible enough; it ensures that convicted
ons will serve no less than a specific time in prison.
t if justice is a concern, mandatory minimums
l permit judges to incarcerate those convicted of
ser crimes. When limiting discretion to punish
iently, one must simultaneously limit the power
punish harshly.[17]

E DETERRENCE CALCULUS

Two centuries ago, Jeremy Bentham proposed that
ıtences be calculated on the basis of their deterrent
ect.[18] The idea has recently been revived by
ıiversity of Chicago economist Gary Becker and
ıers.[19]

General deterrence is the effect of threatened pun-
ment to intimidate people from offending. If A
punished for violating the law, that is a deterrent
t induces him—or induces B, C and D—to comply
en they otherwise might not have complied.

According to Bentham and Becker, sentences should be decided by weighing the deterrent returns of the penalty against the "costs" of punishing. Punishment prevents harm by deterring crimes; it also creates harm by making punished offenders suffer—and their pains must be taken into account. The proper sentence, they suggest, is the one that yields the optimum balance of aggregate benefits (crime prevented) over aggregate costs (including the pain inflicted on punished offenders).

The traditional criticism of this approach has been somewhat misdirected. Critics have challenged the very idea of deterrence, arguing that high recidivism rates among convicted offenders show that deterrence "doesn't work." But this argument is fallacious. Even if a punishment does not alter the behavior of the particular individual penalized, it still works as a general deterrent if the example of his punishment induces others to comply. In the absence of punishment, a much larger number of persons—who now refrain—might have committed crimes.

If one is asking "why should punishment exist at all?", deterrence is a useful notion. As the Norwegian criminologist Johannes Andeneas has said, "it is still a fundamental fact of social life that the risk of unpleasant consequences is a very strong motivational factor for most people in most situations."[20] Crime rates are admittedly high today, but they probably would be higher if assaults, thefts and other antisocial acts went unpunished. One reason for the existence of a system of criminal sanctions is that it deters—at least in the minimal sense of securing more compliance than there would be were there no legal sanctions at all.[21]

Bentham and Becker, however, are more ambitious. They want to rely on general deterrence not merely to justify the existence of punishment, but to decide *how severely* we should punish different classes of convicted offenders.

A DIFFICULTY

One obstacle to the Bentham-Becker deterrence calculus is the insufficiency of data. To decide sentences on the basis of their deterrent effects, we would need reliable information on how the rates of various crimes will be affected as the penalty varies. We are still far from having such information. While there is reason to believe that (for some offenders at least) a penalty serves better as a deterrent than no penalty, we are still far from able to measure the deterrent effect with any precision. Deterrence could be measured by varying a penalty and tracing the effect on the crime rate. The crime rate, however, is affected not only by the penalty level but by a host of other factors—the likelihood of being apprehended and punished, changes in economic conditions, increases or decreases in racial tensions, and so forth.

[5] See Gettinger, *op. cit.*, p. 17; also see Melvin Axilıd's article, "American Prisons and Jails," in *Current tory* (June, 1976), pp. 265ff.
[6] Von Hirsch, "Giving Criminals Their Just Deserts."
[7] Andrew von Hirsch, "Matching Crime and Punishnt," *The Washington Post*, February 8, 1976.
[8] Jeremy Bentham, *An Introduction to the Principles of rals and Legislation* (New York: Hafner, 1948).
[9] Gary S. Becker, "Crime and Punishment: An Economic proach," vol. 76, *Journal of Political Economy* (1968), 169; see also, American Friends Service Committee, *uggle for Justice* (New York: Hill and Wang, 1971), 62–64; statement of Simon Rottenberg in von Hirsch, *ing Justice*, pp. 175–177. See, also Gordon Tullock, ɔes Punishment Deter Crime?" *The Public Interest* ımmer, 1974).
[0] Johannes Andeneas, "The Morality of Deterrence," vol. *University of Chicago Law Rev.* (1970), pp. 649, 664.
[1] Von Hirsch, *Doing Justice*, ch. 5.

Our techniques of identifying and controlling for such other influences are still rudimentary in deterrence research.[22]

The question of fairness arises again. The cost-benefit calculus looks at aggregates—at how much *total* harm a species of crime does and how much total suffering must be inflicted on offenders to reduce its incidence. In dealing with such aggregates, justice to the person punished may be overlooked. Suppose, for example, that the data were to show that a certain kind of petty larceny could most effectively be deterred by invoking a severe penalty against a very few offenders. The cost-benefit approach could support the use of the severe penalty, if the aggregate harm prevented (inconvenience to many individual victims) exceeded the total pain inflicted (a severe sanction imposed on only a few offenders).[23] Yet is it equitable to inflict such a severe penalty, if the harm done by the individual offender is so slight?

A "JUST DESERTS" MODEL

The Committee for the Study of Incarceration, with which I have been associated, has recently suggested a different conceptual model in its report, *Doing Justice: The Choice of Punishments*.[24] It is to rely chiefly on the idea of *desert:* the offender should be punished as severely as he deserves, in view of the seriousness of his crime.

The idea of desert was long out of fashion. The sentence, it was thought, should fit the criminal, not the crime. Deserved punishment was seen as vindictive and unscientific. Our committee concluded, however, that desert is not only rational but essential to justice in sentencing.

Deserved sentences are those that are proportionate in their severity to the seriousness of the crime of which the offender was convicted. Only grave offenses—acts of violence, for example—merit severe penalties. Non-serious offenses deserve non-severe punishments. Sentences that do not comport with the seriousness of the offense are unjust. As *Doing Justice* puts it:

> The severity of the penalty carries implications of degre of reprobation. The sterner the punishment, the great the implicit blame: sending someone away for sever years connotes that he is more to be condemned than do jailing him for a few months or putting him on prob tion. In [sentencing] penalties, therefore, the crim should be sufficiently serious to merit the implicit repr bation. . . . Where an offender convicted of a min offense is punished severely, the blame which so drast a penalty ordinarily carries will attach to him—and u justly so, in view of the not-so-very wrongful charact of the offense. . . . [Conversely] imposing only a sligh penalty for a serious offense treats the offender as *le* blameworthy than he deserves.[25]

To satisfy this requirement of justice, the seriousn of the crime must indicate the penalty. The fo should be on the harm done or risked by the offer er's criminal act and his degree of culpability.[25a] allocate penalties on any basis other than seriousn would be unfair.

Dessert focuses on the past—on the offender's tion. The likelihood of the offender's returning crime in the future should be irrelevant to the cho of whether and how long to imprison him. Even crime-forecasting techniques could be improved, offender doesn't deserve to have his punishment creased (or decreased) on the basis of what he is p dicted to do rather than on the basis of the serio ness of what he has done.[25b]

A sharp reduction in sentencers' discretion is nec sary to such a dessert-based system. In order to sc the punishment to the seriousness of the crime, th must be standards governing how severely offend should be punished for crimes of different grav Otherwise, individual judges having different mo outlooks could impose divergent sentences for simi criminal acts. The Incarceration Committee's repo therefore, proposes a system of standardized penalti for each gradation of seriousness, a definite penalty the "presumptive sentence"—would be set. The fender would normally receive that specific sente —unless there were unusual circumstances of agg vation or mitigation.[26] The presumptive sentence preferable to the mandatory minimum because it li its the power not only to under-punish, but to *ov punish:* severe sanctions for lesser infractions would barred. Those convicted of similar offenses could pect similar punishments, while some degree of fl ibility would still be allowed to deal with out-of-t ordinary cases.

Severity would have to be reduced. Impris ment, being a severe penalty, is deserved only crimes that are *serious*—e.g., crimes of actual threatened violence and the more heinous white co crimes.[27] And even then, time in prison should measured with strict parsimony: the Incarcerat Committee's report proposes that most prison s tences be kept below three years,[28] save for mur and certain other especially reprehensible crim

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[22] Von Hirsch, *Doing Justice,* ch. 7; David F. Greenberg, "Crime Deterrence Research and Social Policy," Department of Sociology, New York University, 1976 (to be published in Stuart Nagel, ed., *Modeling the Criminal Justice System* (Beverly Hills: Sage Publications, 1977).

[23] Von Hirsch, *Doing Justice,* p. 65.

[24] *Ibid.*

[25] *Ibid.,* pp. 71–73.

[25a] For an enumeration of some of the issues involved in assessing harm and culpability, see *ibid.,* ch. 9.

[25b] For further discussion, *ibid.,* ch. 15.

[26] *Ibid.,* ch. 12. For a fuller description of a system of "presumptive sentences," see also Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* (New York: McGraw-Hill, 1976).

[27] Von Hirsch, *Doing Justice,* ch. 13.

[28] *Ibid.,* ch. 16.

(We are speaking of time *actually* served in prison, since the prescribed sentences would be definite and not subject to later reduction by a parole board.[29])

It is worth emphasizing that these punishments, although milder, would be surer. Under today's discretionary system, there is much harshness but little certainty. Some unlucky individuals convicted of a commonplace property offense are sent to prison for substantial periods; on the other hand, many serious offenders receive surprisingly mild punishments—a convicted armed robber with a major prison record has a good chance of getting only probation in some urban jurisdictions.[30] Under a deserts-based system, by contrast, anyone convicted of a sufficiently serious offense would *have* to go to prison. The criminal who assaulted someone with a weapon could no longer be put on probation because that seemed "best" for him; the seriousness of the offense would determine the sentence, and the judge's discretion would be restricted.

A deserts model has its own problems. One question is how to limit disparities stemming from plea-bargaining discretion. Sentencing standards alone would still leave the prosecutor free to bargain. Plea bargaining (if allowed to continue at all) should be subjected to controls that are designed to achieve consistency between the prosecutor's bargaining decisions and the sentencing standards;[31] devising such controls will be no easy matter. Developing standards for judging the seriousness of crimes will be another major task. While sociologists have found that there is considerable popular consensus as to which crimes are more serious than others,[32] it remains to translate these perceptions into workable criteria for seriousness which judges can use in sentencing decisions.

The attraction of a deserts model lies in the modesty of its aim: it seeks simply to make the system fairer.[33] Rather than trying to surmise on insufficient evidence how this or that sentence will affect crime rates, the system rests on practical and moral judgments—which we *are* capable of making—of whether one kind of behavior is more harmful and culpable than another.

ANY CONVERGENCE?

While these newer approaches—the incapacitation model, the deterrence calculus and the deserts model—rest on different theoretical premises, they have certain points of convergence in practice.

One common thesis is the limitation of sentencing discretion. In all these models, the emphasis will no longer be on fitting the sentence to the individual criminal's "needs." Instead, there will be norms that prescribe more or less standardized sentences for different categories of crimes. Disparity of sentence will be reduced, it is hoped.

The other is a lessening of the extremes of harshness and leniency. There will be fewer long prison sentences. (In the incapacitation and deterrence models, this is based on pragmatic considerations: lengthy prison terms would be eschewed because they tend to be less certain—since prosecutors and judges tend to find ways to circumvent harsh sentences in cases that evoke their sympathy. In the deserts model, it is a matter of principle: none but the very worst offenses deserve stringent punishment.) On the other hand, those convicted of serious crimes would expect some time in prison.

If there are these areas of agreement, what difference does it make which theory is adopted? One important difference is the criteria for success or failure. The incapacitation and deterrence models are aimed exclusively at crime control. If that is the aim and if surer but milder punishments were to fail to reduce crime, what then? Seemingly, one would, on these theories, be obliged to try more drastic methods and see if they work. Desert, however, has a different aim—achieving fairness. Even if a deserts-based scheme were not successful in reducing crime rates, it is defensible still on the grounds that it is more equitable. This difference in aim may be important. Although we are capable of making the sentencing system fairer, it may be unrealistic to hope for major

(Continued on page 33)

[29] *Ibid.*, ch. 12. There would be no need to postpone and leave to a parole board's discretion the decision as to duration of imprisonment: since the seriousness of the crime—which is decisive of the penalty in a deserts-based system—is knowable at the time of sentencing.

[30] For statistics on the relatively low percentage of serious offenders now sent to prison, see Adrienne Weir, "The Robbery Offender," in *The Prevention and Control of Robbery*, ed. by Floyd Feeney and Adrienne Weir (Davis, Cal.: U. Cal. at Davis, Center for Administration of Criminal Justice, 1973); see also Wilson, *op. cit.*, ch. 8.

[31] Von Hirsch, *Doing Justice*, ch. 12.

[32] See Thorsten Sellin and Marvin Wolfgang, *The Measurement of Delinquency* (New York: John Wiley, 1964); Peter H. Rossi et al., "The Seriousness of Crime: Normative Structure and Individual Differences," vol. 39, *Am. Sociological Review* (1974), p. 224.

[33] For a discussion of what (if any) crime control benefits a deserts-based system will have, see von Hirsch, "Giving Criminals Just Deserts."

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"An important problem in improving the criminal justice process is how to allocate the scarce resources of the criminal justice system, including personnel, effort and, especially, budget dollars."

Improving the Criminal Justice Process

By Stuart Nagel
Professor of Political Science, University of Illinois
and Marian Neef
Doctoral Candidate, University of Illinois

In an analysis of the criminal justice process, some perspectives are useful. These perspectives or ways of viewing occurrences seek to understand why criminal justice decision makers decide the way they do. The specific problems relate to pretrial release, legal counsel for the poor, plea bargaining, delay in the court, judicial selection, the jury system, and allocating scarce criminal justice system resources.[1]

One useful perspective for viewing the pretrial release problem is to compare a judge who is trying to decide whether to release or hold a defendant to a businessman deciding between two alternative business activities. The judge wants to choose the alternative that will maximize his benefits minus his costs. He benefits if he releases a defendant who will appear, and incurs costs if he releases a defendant who fails to appear. Likewise, the judge benefits if he detains a defendant who would fail to appear, and incurs costs if he holds a defendant who would have appeared if he were released.

This perspective clarifies the reasons why judges may unnecessarily hold defendants in jail prior to trial. Today, a judge incurs more expenses if he releases a defendant who embarrasses the judge by failing to appear in court, than he incurs if he holds a defendant who would have appeared anyway, since no one knows a specific defendant would have appeared. What is needed is a way of making more visible the errors of holding defendants who would have appeared anyway. For each judge in a given court circuit, the public should know what percentage of his defendants he holds in jail prior to trial, and what percentage of the defendants whom he releases appear in court. There is great variation among the judges with regard to the percentage of defendants each one holds, but it is probable that nearly all the judges have about a 90 percent appearance rate for the defendants they release. If this is so, then judges detaining a relatively high percentage of defendants would find it difficult to justify doing so, and they might therefore lower their detention rates without substantially lowering their appearance rates.

Another useful perspective for viewing the pretrial release problem is to compare the situation to a businessman's inventory problem. If a businessman holds too much inventory, he will incur excessively high storage costs. If he holds too little inventory, he will incur excessively high outage costs or missed sales orders that he cannot fill. The object is to hold the amount of inventory that will minimize the sum of the storage and outage costs.

If too many defendants are detained before they are tried, then excessive detention costs are incurred with regard to jail maintenance, lost income, bitterness, family welfare payments, increased conviction probability, and jail riots from overcrowding. If too few defendants are held, then excessive releasing costs are incurred with regard to the cost of rearresting

[1] This article in effect builds upon the more elementary factual article by Stuart Nagel, "The Need for Judicial Reform," *Current History*, vol. 61, no. 113 (August, 1971), pp. 65–70. For further detail on the perspectives briefly described in this present article, see Stuart Nagel and Marian Neef, *Operations Research Methods: Applied to Political Science and the Legal Process* (Beverly Hills, Calif.: Sage Publications, 1976), and Nagel and Neef, *Policy Optimizing Models and the Legal Process: Maximizing Goals in the Criminal Justice System* (Lexington, Mass.: Lexington-Heath, 1976). Also see Gordon Tullock, *The Logic of the Law* (New York: Basic Books, 1971); Gary Becker and William Landes, *Essays in the Economics of Crime and Punishment* (New York: Columbia University Press, 1974); and Richard Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1973). The authors thank the Ford Foundation Public Policy Committee, the LEAA National Institute, and the University of Illinois Law and Society Program for financing the research on which this article is based, but none of those organizations is responsible for the ideas advocated here.

on-appearing defendants and the cost of crimes committed by released defendants. Preliminary analysis f these two kinds of costs tend to show that the ptimum detention percentage under which total osts are minimized is substantially lower than the 0 percent figure that is common in many cities.

A third perspective for viewing the pretrial release roblem is to compare bond-setting to an investment /here one is seeking to maximize the income minus he expenses. More specifically, one can regard bond-etting as being an attempt to find a bond figure for ach crime category that will maximize (1) the prob-bility that the average defendant in that category /ill appear in court to retrieve his bond money minus 2) the probability that the defendant will be held in ail because he is unable to meet the bond.

This perspective can be useful in developing a sys-em of automatic bonds or flat bond-setting that ends great deal of the judges' bond-setting discretion, nalogous to the movement toward flat sentencing. A system of flat bond-setting would involve the staff eople of the state legislature, the attorney general's ffice, or a criminal justice agency, who would gather ata showing for each crime at various bond levels r intervals (1) what percentage of the defendants eleased appeared in court at each interval and (2) /hat percentage of the defendants were held in jail or failure to meet the bond at each interval. The ond level set for each crime where percent appeared inus percent held is the greatest would be the bond evel specified by statute in which judges would be equired to set bond for that specific crime. For riving while intoxicated the bond level might be 200 to $250, whereas for a charge of rape the bond nterval might be $3,000 to $3,500.[2]

EGAL COUNSEL FOR THE POOR

A useful perspective for analyzing the problem of roviding legal counsel for the poor in criminal cases to compare each alternative method to a business ctivity in which we want to select the activity that /ill give us the greatest profits, i.e., benefits minus osts. The main alternative methods are (1) a list of volunteer attorneys, (2) assigned counsel, generally on a rotation basis, from among practicing attorneys in the county, or (3) a public defender who is a salaried lawyer hired by the government to represent poor defendants. All other things being equal, clearly, the best alternative is the most (a) inexpensive, (b) visible and accessible, (c) politically feasible, and (d) the most likely to result in specialized competence and aggressive representation.

Starting with the goal of inexpensiveness, volunteer counsel and assigned counsel score well. The public defender system is substantially more expensive. On visibility and accessibility, all three alternatives are about equal in the sense that arraigning magistrates are expected to inform poor defendants of whatever system the county uses for making counsel available to poor defendants. On political feasibility or acceptability, there is not likely to be any great opposition among influential lawyers either to the volunteer or to the public defender alternatives. They are, however, likely to object to the assigned counsel alternative since it forces lawyers against their will to devote time and resources to cases that they may find frustrating or even distasteful. Volunteer counsel is unlikely to result in competent, aggressive lawyers unless substantial fees are paid to the screened volunteers, a system that exists only at the federal level. Likewise, assigned counsel tends to result in the appointment of lawyers who may be competent in their specialty, which is not likely to be criminal law. The public defender system develops competent criminal defense attorneys through specialized continuous experience, although their aggressiveness may be limited by lack of funding and personnel.

The above analysis indicates three benefits for volunteer counsel and one cost; two benefits for assigned counsel and two disadvantages; and three benefits for the public defender system and one disadvantage. To resolve the tie between volunteer counsel and the public defender relative weights must be assigned to the four goals. If more weight is given to the goals of visibility-accessibility and competence-aggressiveness (as a more liberal policy-maker might be inclined to do), then the public defender comes out ahead. If more weight is assigned to the goals of inexpensiveness and political feasibility (as a more conservative policy-maker might be inclined to do), then the volunteer system comes out ahead, assuming that it is capable of providing sufficient counsel to satisfy the constitutional requirements. This analytic perspective of listing alternatives, goals, relations, weights, and choices may also be applicable to obtaining insights into the best alternatives for resolving other criminal justice problems.[3]

About 80 percent of all criminal cases are settled when the defendant makes an agreement with the

[2] For further detail on pre-trial release models, see William Landes, "The Bail System: An Economic Approach," *ournal of Legal Studies* vol. 2 (1973), p. 79; J. Locke t al., *Compilation and Use of Criminal Court Data in Re-ition to Pre-Trial Release of Defendants: Pilot Study* Washington, D.C.: National Bureau of Standards, 1970); nd Nagel and Neef, *The Policy Problem of Doing Too fuch or Too Little: Pretrial Release as a Case in Point* Beverly Hills, Calif.: Sage Publications, 1976).

[3] For further detail on evaluative models and data with egard to legal counsel for the poor, see Dallin Oaks and Villiam Lehman, *Criminal Justice System and the Indigent* Chicago: University of Chicago Press, 1968); Lee Silver-ein, *Defense of the Poor: The National Report* (Boston: ittle, Brown, 1965); and Nagel, *Improving the Legal Pro-ess: Effects of Alternatives* (Lexington, Mass.: Lexington-leath, 1975), pp. 57–80.

prosecutor to plead guilty, usually in return for the prosecutor's agreement to a lowered charge or sentence than would otherwise be passed. A useful perspective regards the defense as a buyer, and the prosecutor as a seller in a market that has no fixed prices, like the market of a pushcart peddler. The defendant-buyer tries to get as low a price, sentence, or charge as possible. The prosecutor-seller tries to get as high a price as possible within the constraints imposed by the criminal law and by his sense of fairness. The defendant-buyer has a maximum buying price that is largely determined by his perception of the sentence that he would receive if convicted, discounted by the probability of his being convicted, plus a bonus that he is willing to give to avoid the cost of going to trial. The prosecutor-seller has a minimum selling price that is largely determined by his perception of the sentence that would be given if there were a conviction, discounted by the probability of obtaining a conviction, minus a discount that he is willing to give to avoid the cost of going to trial. The defendant and prosecutor are likely to reach an agreement (whereby the defendant will plead guilty to a lowered charge or sentence) whenever, but only whenever, (1) the defendant is willing to make an offer that is above the prosecutor's minimum, and (2) the prosecutor is willing to make an offer that is below the defendant's maximum.

This perspective is useful in planning for the effects of change in the judicial process. Almost any process change is likely to affect sentences, the probability of conviction, and the costs of going to trial, and is therefore likely to affect the likelihood and the level of settlements being reached. For example, an increase in pretrial release will eliminate one of the costs of going to trial for many defendants, namely, the inconvenience of staying in jail awaiting trial instead of pleading guilty and receiving probation or a sentence equal to approximately the time they have already served in jail. If that trial cost to the defendant goes down, he may be less willing to plead guilty, and an increase in trials may result unless the prosecutor is willing to offer a bigger discount. An increase in trials can mean increased delay in the processing of defendants both in jail and out unless processing personnel is increased or a substantial priority is given to the trials of in-jail defendants. If delay does increase, then the jail population is likely to increase (even though fewer defendants are being sent there to await trial), because the size of the jail population is determined by how long people remain in jail as well as how many are sent there.

The same perspective can also be used to analyze some of the effects of judicial process changes like an increased right to counsel, more resources for the prosecutor, mutual pretrial discovery proceedings, flat sentencing, the abolition of the rule excluding illegally seized evidence, or the restoration of capital punishment.

A second major purpose of the buyer-seller perspective on plea bargaining is to enable one to see what steps to take to ensure that the plea bargaining process arrives at sentences that more closely approximate the sentences that would be handed down if the cases went to trial. In that case, society would enjoy most of the benefits of going to trial without the expensive costs. To reach this goal, the defendant and the prosecutor would need to be able accurately to perceive what sentence would be given in the event of a conviction and the probability of a conviction. Such perceptions can be facilitated by flat or more objective sentencing and by better mutual pretrial discovery procedures. The defendant also would need to be free of pressures to offer an excessive bonus as the result of (a) being held in jail pending a distant trial, (b) being unable to afford an expensive lawyer and not being eligible for a free one, (c) being represented by a public defender who has neither the time nor the resources to take cases to trial when trial would bring a lower likely sentence than would result from plea bargaining. In addition, the prosecutor would need to be free of pressure to offer an excessive discount as the result of having neither the time nor the resources to take a case to trial when trial would bring a higher likely sentence than would result from plea bargaining.[4]

DELAY IN CRIMINAL CASES

One useful perspective for analyzing the problem of delay in criminal cases is to compare the courts to the processing of automobiles at a toll plaza. If the cars are backed up more than is considered desirable the backlog and delay can be reduced by three general methods. First, another booth can be opened since four booths can obviously process cars faster than three booths. Second, the amount of time involved in processing each car can be reduced by changing the toll rates so that more cars are likely to have exact change. Third, the number of vehicles coming to the toll plaza can be reduced by specifying that no trucks are permitted at this toll plaza, but that they should pay their toll at a weighing station down the road.

That same basic perspective can be applied to delay in the courts. Additional courtrooms, judges, prosecutors, public defenders can be added, or the

[4] For further detail on plea bargaining models, see William Landes, "An Economic Analysis of the Courts," *Journal of Law and Economics,* vol. 14 (1971), pp. 61–107; Richard Posner, "An Economic Approach to Legal Procedure and Judicial Administration," *Journal of Legal Studies,* vol. 2 (1973), pp. 399–458; and Nagel and Neef, "The Impact on Plea Bargaining of Judicial Process Changes," *American Bar Association Journal,* vol. 62 (1976).

:an work longer hours. To reduce the amount of time ıeeded to process each case, a more random, less ime-consuming selection of twelve or six jurors can ›e established. More mutual pretrial discovery can ıarrow the trial issues. The number of cases that ;o to trial (or to toll booth processing) can be reluced by facilitating out-of-court settlements through ı better understanding of the plea bargaining process. The number of cases can also be decreased by de-:riminalizing victimless crimes and by diverting more :ases to other forms of processing.

Another perspective useful in analyzing the delay ›roblem is to regard the criminal justice system as a ystem of dominoes, where knocking over one domino nay have effects far down the line. This is also ınalogous to playing chess whereby one attempts to hink many moves ahead in assessing the effects of a ;iven move. Already mentioned is the effect of in-:reased pretrial release on decreased guilty pleas, in-:reased trials, increased delay, and increased, rather han decreased, pretrial jail population. A related :xample involves the domino effect of increased pre-rial release on the workload of public defenders. Suppose the pretrial release percentage goes from ›nly 40 percent released (and 60 percent held) up to 80 percent released (and 20 percent held). Suppose, urther, that of those released, 45 percent plead not guilty (and 55 percent plead guilty); and of those ıeld in jail, only 25 percent plead not guilty (and '5 percent plead guilty). Of those who plead not guilty, suppose about 67 percent ask the public de-ender to represent them, and about 33 percent use ıired counsel or no counsel. This means that before he increased pretrial release occurred, out of every 00 defendants arraigned, the public defender would ıave 12 plus 5 cases (i.e., 100 cases, times .40 re-eased, times .45 plead not guilty, times .67 ask for he public defender; *plus* 100 cases, times .60 held, imes .25 plead not guilty, times .33 ask for the public lefender). After the increased pretrial release, out ıf every 100 defendants arraigned, the public de-ender would have 24 plus 2 cases (i.e, 100 cases, imes .80 released, times .45 plead not guilty, times 67 ask for the public defender; *plus* 100 cases, times 20 held, times .25 plead not guilty, times .33 ask for he public defender). Thus increasing pretrial re-ease from 40 to 80 percent would result in an in-rease in public defender cases from about 17 percent ıf the arraigned defendants to about 26 percent. It might therefore be necessary either to hire extra public defender personnel in anticipation of an increased workload or to ration the public defenders differently.[5]

JUDICIAL SELECTION AND TENURE

The main judicial selection problem is whether judges should be elected or appointed, and whether they should have long or short tenure. Given two choices on the elected/appointed dimension and two choices on the long/short tenure dimension, there are four possibilities. Judges can be (1) elected with short tenure, (2) elected with long tenure, (3) appointed with short tenure, or (4) appointed with long tenure. A useful perspective for viewing this problem involves listing alternatives, goals, relations, weights, and choices.

Two goals that are important involve (a) securing judges who are either economic liberals or economic conservatives, when economic issues arise that cannot be resolved by clear precedents, and (b) securing judges who are civil libertarian liberals or conservatives, when legal or factual civil liberties issues arise. One way to determine the relations between the four alternatives and these goals is to compare elected judges with appointed judges serving on the same state supreme circuit courts to fill out unexpired terms of resigned, retired, or deceased judges; and to compare relatively long-term judges with judges filling out short, unexpired terms. The evidence tends to indicate that elected judges with short tenure (category 1) tend to be relatively positive on economic liberalism, when one holds political party affiliation constant. This may be because more elected judges, who are often former party workers, tend to come from working-class backgrounds and sympathies than appointed judges, who are more likely to be chosen from the more prominent law firms. It is possible that the short tenure tends to make a judge less sensitive to minority rights than a judge with long tenure, who has more independence of the majority's lack of sympathy with the rights of criminal defendants, radical soap box orators, and minority ethnic groups.

Elected judges with long tenure (category 2) tend to be positive on economic liberalism by virtue of their method of selection, and also positive on civil

(Continued on page 32)

[5] For further detail on judicial delay models, see Haig ›ohigian, *The Foundations and Mathematical Models of Operations Research with Extensions to the Criminal Justice System* (Yonkers, N.Y.: Gazette, 1971); Hans Zeisel, Harry Kalven, and Bernard Buchholz, *Delay in the Court* Boston: Little, Brown, 1959); and LEAA National Institute of Law Enforcement and Criminal Justice, *Reducing Court Delay* (Washington, D.C.: U.S. Government Printing Office, June, 1973).

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". . . our previous overconcern with the rights of criminal defendants must not lead us too far in the other direction; we must always remember that the person accused of a crime is an individual entitled to the fair and equal protection of the laws no less than is the victim, but no more."

The Accused versus Society: A Dilemma of Conflicting Rights

By Jack M. Kress
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We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .

The Declaration of Independence

The genius of the American system seems to lie in its stress on the rights of individual citizens. Its major premise is that individuals possess rights and that the government owes its powers to grants from the citizenry. This is in marked contrast to other government systems that insist that the citizen exists to serve the state and the society and that citizens' "rights" are derivative grants from the State to the individual.

There is a conflict between the rights of the accused and the rights of society; yet, the conflict is really between the rights accorded different individuals. The life or liberty of one has typically been threatened by the behavior of another. One we call the victim and the other the criminal defendant. Is it time, as one Connecticut judge recently put it, for the law to "swing around to giving more consideration to the plight of innocent victims of crime, as opposed to the present emphasis on the rights of offenders"? The problem is to strike a balance between the rights of society and the rights of the criminal defendant.

Students of American history are, of course, familiar with the concept of "checks and balances," an example of the mistrust of uncontrolled government of our founding fathers. So far, in the criminal area, the many protections placed around persons accused of crime demonstrate our overriding concern with individual liberty. Indeed, no nation on earth goes as far as the United States to provide such safeguards Regardless of the seriousness of the crime, a defendant is entitled to all the protections and guarantees of the law. The American criminal justice system is structured to reduce to an absolute minimum the possibility that an innocent person will be convicted of a crime.

There are those who believe that we have gone too far in protecting the rights of the accused. They argue that the rights of law-abiding citizens deserve greater protection. They say that our criminal justice system is so out of balance today that it is too difficult to convict and/or adequately punish even those who are plainly guilty of heinous offenses. Warren Earl Burger, in a speech delivered before he became Chief Justice of the United States Supreme Court suggested one criterion by which he would judge whether or not our system was in balance:

> [A] government exists chiefly to foster the rights and interests of its citizens—to protect their homes and property, their persons and their lives. If a government fails in this basic duty, it is not redeemed by providing even the most perfect system for the protection of the rights of criminal-court defendants.

OUR CRIMINAL JUSTICE SYSTEM

In order to assess whether or not the system is out of balance, we should outline the "rights" we are talking about—most of which grow out of the "Bill of Rights," the first ten amendments to the United States constitution.

While procedures vary somewhat from state to state, in most criminal cases a suspect is arrested by the police with minimal investigation and only after a citizen complaint of crime. This suspect is searched at the scene, then transported to the station house where questioning may occur, followed by the taking

of fingerprints and photographs. The police officer then consults with the district attorney and charges are officially brought against the defendant. The defendant subsequently appears before a magistrate (or local judge) who explains the charges to the defendant, sets bail, and assigns an attorney to the defendant.

A few jurisdictions (like New York State and the federal courts) still have grand juries, which may then hear witnesses against the defendant and bring in an indictment. Most states, however, next require a preliminary hearing before a judge, following which a formal presentment of charges is made. The defendant is then arraigned on these charges (in the form of an indictment or a presentment) and pleads either guilty or not guilty. A not guilty plea is followed by a series of preliminary motions by the defense attorney either to have the charges dismissed outright or to suppress certain items of evidence. Then there is a jury trial, resulting in either acquittal or conviction. Upon a conviction, either by a plea of guilty or by a jury finding, the defendant is sentenced to a term of probation or of imprisonment. The defendant may appeal the conviction (and sometimes the sentence) through several levels of courts, possibly all the way to the United States Supreme Court.

THE POLICE STAGE

Although few arrests are the products of extensive investigation, those that are often involve serious matters like murder or organized criminal activity. The tools of police investigation in such cases may include various forms of electronic eavesdropping or wiretapping. Generally speaking, government agents may use these tools whenever their actions are reasonable and are based on probable "cause" that they will uncover evidence of a crime. Prior court approval is required before a law enforcement agency may proceed—and that approval will be granted only if the court is convinced of both reasonableness and probable cause.

Searches of a more general nature are treated in a similar manner. The provisions of the fourth amendment to the United States constitution state:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ordinarily, government agents cannot search people, cars or homes without a search warrant issued by a judge. The biggest exception to this rule is that, incidental to a lawful arrest, the person and a fair portion of the place where the person is found may be searched. Thus it is important to know the grounds for arrest. The general rule is that for less serious crimes (misdemeanors) a police officer may arrest a person only if the crime is committed in the presence of the officer; in the case of more serious crimes (felonies), the officer may arrest when there is reasonable cause to believe that the defendant committed the crime.

In the case of *Miranda* v. *Arizona*,[1] decided in 1967, the United States Supreme Court placed sharp limitations on the rights of police to question suspects. The Supreme Court based its decision partly on that portion of the fifth amendment that states that "No person shall be . . . compelled in any criminal case to be a witness against himself. . . ." Today, before any questioning by an officer may begin, the suspect must be told:

1. You are warned that anything you say may be used in a court of law against you;
2. You have an absolute right to remain silent;
3. You have the right to the advice of a lawyer before the questioning, and the presence of a lawyer here with you during the questioning;
4. If you cannot afford a lawyer, a lawyer will be appointed for you at the state's expense and free of charge, if you so desire;
5. At any time during the course of the questioning, you may refuse to continue with the questioning.

Although most people remember the *Miranda* decision because it decreased the possibility that police could obtain confessions from criminals, it should be noted that it also informs a suspect, at the earliest possible stage, of the right to counsel. That right, among others, is guaranteed by the sixth amendment to the constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

THE COURT STAGE

The appearance before the local magistrate (or justice) is supposed to take place as soon as it is practically possible. Too great a delay between the arrest and the initial appearance (sometimes also called an arraignment) is not allowed. The magistrate again tells the defendant that he has the right to obtain counsel. In 1963, in *Gideon* v. *Wainwright*,[2] the United States Supreme Court held that the states have a duty to provide counsel, in all serious cases, to all persons too poor to afford their own. In 1972, in the case of *Argersinger* v. *Hamlin*,[3] the Supreme

[1] 384 U.S. 436 (1967).
[2] 372 U.S. 335 (1963).
[3] 407 U.S. 25 (1972).

Court extended this right to a free attorney even to those charged with petty offenses.

An extremely important function of the initial appearance before a magistrate is setting bail. The eighth amendment to the constitution states that "Excessive bail shall not be required. . . ." The only legitimate purpose of bail is to insure that the defendant will not run away from the jurisdiction but will be available for the trial. In practice, the amount of bail required usually, but not always, increases with the seriousness of the alleged crime. Therefore, people who are charged with very trivial crimes may be released without any bail being required, while those accused of murder (who are thought to have a strong motive to run) may be denied bail.

The function of the grand jury, or of the preliminary hearing, is to "test" the evidence in some way before trial. At the preliminary hearing, for example, the victim and the arresting officer usually testify briefly about the circumstances of the crime and they will be briefly cross-examined by the defense attorney. If, after hearing this, the judge is convinced that there is sufficient evidence that a crime has been committed by the defendant, then a presentment is issued.

At the arraignment, the defendant must plead to the charges in the indictment or presentment. A plea of not guilty may always be withdrawn and changed to one of guilty; a plea of guilty is not quite so easily changed once made. About nine out of every ten convictions in the United States result from a plea of guilty. The reason for this is a practice approved by the Supreme Court in the 1971 case of *Santobello* v. *New York*:[4]

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged.

The state engages in plea bargaining largely because it is cheaper and quicker than a long jury trial. The defendant participates primarily because plea bargaining normally results in the imposition of a lighter sentence than one imposed after trial and conviction.

If the defendant chooses to plead not guilty and stand trial—and that choice is entirely up to the defendant—then a number of other rights come into play, including the right to select (to some extent) among potential jurors, the right to cross-examine opposing witnesses, the right to object to the introduction of improper evidence, and the right to testify on his or her own behalf.

[4] 404 U.S. 257 (1971).
[5] 367 U.S. 643 (1961).
[6] *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); and *Stovall* v. *Denno*, 388 U.S. 293 (1967).

Should the defendant be convicted (by plea or trial), then a probation officer usually prepares a pre-sentence report for the judge that will help the judge in imposing sentence. This report will contain an evaluation of the defendant's prior criminal record, employment and school history, as well as additional information about the crime with which the defendant was charged. Today, a defendant is sometimes entitled to see portions of the pre-sentence report prepared for a judge and to challenge those portions that the defendant regards as inaccurate. The majority of convicted American defendants are sentenced to probation.

THE EXCLUSIONARY RULE

What happens if there is a violation of the rights of the accused? It has been said that a right without a remedy for its infringement is meaningless. Many remedies have been suggested, among them criminal prosecution or an official reprimand of law enforcement officials who violate the rights of suspects, or fines, or compensation to the injured party.

Since the criminal defendant is most concerned with the pending charges, the two principle remedies actually employed have been the dismissal of charges against the defendant and/or the exclusion of evidence in the case. When Earl Warren was Chief Justice, the United States Supreme Court greatly expanded the rights of criminal defendants. While many of the Warren Court rulings have been criticized, none has been as sharply attacked as the Exclusionary Rule of evidence, which (in the case of *Mapp* v. *Ohio*)[5] was made compulsory upon all state courts in 1961. The Exclusionary Rule states that any improper behavior on the part of law enforcement authorities will lead to the suppression and exclusion from trial of evidence obtained as a result of that improper behavior.

The *Mapp* case dealt with an improper search and seizure; the *Miranda* case involved an improperly obtained confession. In 1967, the Supreme Court applied the same rule with respect to improperly conducted line-ups and identification in the *Wade-Gilbert-Stovall* cases.[6] (Note that all of these cases also involved the right to counsel. The Supreme Court has seen the presence of a defense attorney as the primary means of ensuring that all the *other* rights will be enforced.)

Two main criticisms have been made of the Exclusionary Rule and they were both implied in an often quoted commentary on its consequences made by the great Justice Benjamin Cardozo in 1926: "The criminal is to go free because the constable blundered." The first criticism lies in the word "blundered," for a mere accidental mistake may serve to invalidate an entire criminal prosecution.

sloppily typed search warrant, or an unintended p of the tongue may serve to set a murderer or a pist free. (Note: As this issue went to press, on ly 6, 1976, in the cases of *Stone* v. *Powell* [No. 75–05] and *Wall* v. *Rice* [No. 74–1222] the Supreme ɔurt "sharply limited the Exclusionary Rule, re-ıcing the power of federal courts to set aside state urt convictions that rely on illegally obtained evi-nce.")*

The second criticism is that, apart from whether the ıproper conduct is accidental or intentional, the ɛclusionary Rule adopts the policy that two wrongs ake a right. Rather than punishing an intentionally ring law enforcement official and a criminal, both free! The late Supreme Court Justice Robert H. ckson once eloquently described this illogic of the ɛclusionary Rule: "It deprives society of its remedy ainst one lawbreaker because he has been pursued another." Justice Cardozo gave further examples: he privacy of the home has been infringed, and e murderer goes free. Another search, once more ainst the law, discloses counterfeit money or the ıplements of forgery. The absence of a warrant eans the freedom of the forger. Like instances can multiplied."

In terms of that legal balance so often struck by e courts, Justice Cardozo weighed the rights of the cused against the rights of society: "The question whether protection for the individual would not be ined at a disproportionate loss of protection for ciety. On the one side is the social need that crime all be repressed. On the other, the social need at law shall not be flouted by the insolence of fice. There are dangers in any choice." With re-ɪrd to the Exclusionary Rule, however, Justice ardozo felt the choice had to be made in favor of ciety.

If the Exclusionary Rule is not invoked at a pre-ial hearing to suppress evidence, or at a criminal ial, it can be argued on appeal that a conviction ould be overturned and a new trial ordered so as correct this "error."

What are some of the negative aspects of the rights ven to the accused and enforced by the exclusionary le? First and foremost, the abundance of pro-ɛdural protections has led to court delay and over-owding. Our criminal trials are delayed longer ter arrest and extend longer after conviction than ials in almost any other nation in the world. De-nse attorneys make many pre-trial motions, mid-ial objections and post-trial appeals, all of which ust be answered by overworked prosecutors and dges. The answers must be typed; the hearings ust be transcribed; and the result often means re-ial of a long and complex case, thus making the ɔcess not only longer, but far more expensive at a time when state governments are desperately trying to lower their expenditures.

Prosecutors are not allowed to appeal jury acquittals. Yet there may be no end to the defense in a criminal case. All states have at least one level of appellate courts and many have two. And even after the state's highest court has ruled against a defendant, the defendant may press a habeas corpus petition in three levels of federal courts. If the defendant wins at any point, the case is often returned to the lower court for a retrial or for outright dismissal of the charges against the defendant.

Overcrowded court dockets (and overcrowded jails and prisons) have forced courts and prosecutors to offer more and more—and lower and lower—"deals" to more and more criminal defendants; as a result, violent and dangerous criminals may be released with minimal supervision, little punishment, and no rehabilitation. Several years ago, one well-known defense attorney boasted publicly to a group of lawyers: "Because of the recent decisions of the United States Supreme Court, in every criminal case that I defend, I file 30 or 40 motions prior to trial, with the result that the prosecutor and court become so exhausted that I can get any deal I want!"

The sixth amendment protects the right of speedy trial. Yet, strangely, this is a right that the government wants enforced more than the defendant. Chief Justice Burger related that

> the "jailhouse grapevine" tells the accused that the thing to do is plead not guilty, demand release without conventional bail bond, then use every device of pretrial motions, demand for a new lawyer and what-not to delay the trial. This means up to two years' freedom during which witnesses might die, or move, or forget details, while the case drags on the calendar.

One major purpose of the criminal law is to deter would-be wrongdoers from committing crimes. Deterrence can be effective only if both detection and punishment are swift and sure. Yet no one today seriously argues that our justice system is swift and sure. Therefore, it is fair to ask whether we have forgotten the basic purpose of our criminal laws in our efforts to protect the rights of criminal defendants. Moreover, the rights listed so far by no means exhaust those of the accused.

Defendants have a right to receive any information in the possession of the district attorney that might benefit them. Therefore, pretrial hearings are

(Continued on page 35)

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* See *The New York Times*, July 7, 1976, p. 1ff.

"What social policy, as expressed in our penal statutes and laws of criminal justice, should our society have for the punishment of murder and other serious crimes? Looked at in the largest perspective, there are three major alternatives."

The Problem of Capital Punishment

By Hugo Adam Bedau
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June 2, 1976, marked the ninth year without an execution under civil or military law for any crime anywhere in the United States. Yet the statutes of most states authorized capital punishment for a wide variety of offenses. Moreover, since 1967 (when the last execution for murder was carried out in Colorado), there always was someone and usually there were hundreds under death sentence. The explanation for the apparent anomaly of dozens of capital statutes and hundreds of convicts under death sentence but no executions was found in four factors that had a decisive impact on the status of capital punishment in this country in recent years: (1) the concerted legal campaign during the past decade to abolish the death penalty entirely, (2) the unresolved cases before the Supreme Court, which kept the judicial moratorium on executions precariously intact, (3) the public desire for statutes authorizing capital punishment for various crimes, and (4) the high volume and rate of crimes of personal violence (murder, forcible rape, assault, armed robbery) that inspired juries to convict and sentence to death in a steady if irregular pattern.

The history of the controversy in this country over the death penalty has two main phases. For nearly two centuries after the initial protests in the 1780's by Benjamin Rush, the central purpose of "abolitionists" was to persuade the state and federal legislatures to reduce the number of capital crimes, to conduct executions in private, to introduce degrees of murder and confine the death penalty to first degree murder, and to give juries the discretion to sentence after co viction either to death or to life.[1] The fruit of t sporadic campaign (whose highpoints occurred in t 1840's and 1910's) was considerable. Even so, 1950 all but six states still had one or more capi statutes in force and all but a few of these sta conducted executions at least occasionally.

The historical development of "abolitionist" jur dictions is indicated in Table 1. The national recc of executions (at five-year intervals), broken do both in terms of the race of offender and the offer for which execution was imposed, for the midc years of this century, is shown in Table 2. The trij digit execution rate that prevailed prior to Wo War II came to an end over a generation ago, a dropped to a scattered few during the 1960's. Sim taneously, the numbers of white and non-white p sons (predominantly native American black male executed tended toward equality. In the last t generations most executions have been for the cri of murder.

The second phase of the campaign is little mc than a decade old. It was initiated by the Americ Civil Liberties Union and NAACP Legal Defer Fund in the early 1960's, when they became co vinced that the death penalty was unconstitution because it denied "equal protection of the law (fourteenth amendment) and was "cruel and unusu punishment" (eighth amendment). During the p decade or so, therefore, the "abolitionist" effc shifted from legislative revision and repeal of statutc law to focus on appellate litigation under the pr visions of the state and especially the federal constit tions.[2] The year 1970 marked the first major attem to obtain an "abolitionist" reading of the federal co stitution on the death penalty for rape. But in *Mc well* v. *Bishop*,[3] the Supreme Court evaded the iss and reversed the trial conviction on other groun than the unconstitutionality of the death penal Not so a year later. In *McGautha* v. *California*,[4] t

[1] For a general discussion, see "General Introduction" to H. A. Bedau, ed., *The Death Penalty in America*, rev. ed. (Chicago: Aldine Publishing Co., 1968), pp. 1–32.

[2] See Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (New York: Random House, 1973); Burton H. DeWolf, *Pileup on Death Row* (New York: Doubleday, 1973); and H. A. Bedau, "Challenging the Death Penalty," *Harvard Civil Rights—Civil Liberties Law Review*, vol. 9 (1974), pp. 625–643.

[3] 398 F.2d 138 (8th Circ. 1968), vacated on other grounds, 398 U.S. 262 (1970).

[4] 402 U.S. 183 (1971).

TABLE 1: Legal Status of Capital Punishment in the United States, 1846–1972

Region and State	Status on December 31, 1972	History of Actions Taken	Method of Execution in 1972
Federal	Legal		[1]
Northeast			
Maine	Abolished	Abolished 1876; restored 1883; reabolished 1887	xx
New Hampshire	Legal		Hanging
Vermont	Partially abolished	Partially abolished 1965	Electrocution
Massachusetts	Legal		Electrocution
Rhode Island	Partially abolished	Partially abolished 1852	Hanging
Connecticut	Legal		Electrocution
New York	Partially abolished	Partially abolished 1969	Electrocution
New Jersey	Abolished	Abolished January 1972	xx
Pennsylvania	Legal		Electrocution
North Central			
Ohio	Legal		Electrocution
Indiana	Legal		Electrocution
Illinois	Legal		Electrocution
Michigan	Abolished	Partially abolished 1847; abolished 1963	xx
Wisconsin	Abolished	Abolished 1953	xx
Minnesota	Abolished	Abolished 1911	xx
Iowa	Abolished	Abolished 1872; restored 1878; reabolished 1965	xx
Missouri	Legal	Abolished 1917; restored 1919	Lethal gas
North Dakota	Partially abolished	Partially abolished 1915	Hanging
South Dakota	Legal	Abolished 1915; restored 1939	Electrocution
Nebraska	Legal		Electrocution
Kansas	Legal	Abolished 1907; restored 1935	Hanging
South			
Delaware	Legal	Abolished 1958; restored 1961	Hanging
Maryland	Legal		Lethal gas
District of Columbia	Legal		Electrocution
Virginia	Legal		Electrocution
West Virginia	Abolished	Abolished 1965	xx
North Carolina	Legal		Lethal gas
South Carolina	Legal		Electrocution
Georgia	Legal		Electrocution
Florida	Legal		Electrocution
Kentucky	Legal		Electrocution
Tennessee	Legal	Partially abolished 1915; restored 1919	Electrocution
Alabama	Legal		Electrocution
Mississippi	Legal		Lethal gas
Arkansas	Legal		Electrocution
Louisiana	Legal		Electrocution
Oklahoma	Legal		Electrocution
Texas	Legal		Electrocution
West			
Montana	Legal		Hanging
Idaho	Legal		Hanging
Wyoming	Legal		Lethal gas
Colorado	Legal	Abolished 1897; restored 1901	Lethal gas
New Mexico	Partially abolished	Partially abolished 1969	Lethal gas
Arizona	Legal	Partially abolished 1916; restored 1918	Lethal gas
Utah	Legal		Hanging or shooting
Nevada	Legal		Lethal gas
Washington	Legal	Abolished 1913; restored 1919	Hanging
Oregon	Abolished	Abolished 1914; restored 1920; reabolished 1964	xx
California	Legal	Abolished February 1972; restored November 1972	Lethal gas
Alaska	Abolished	Abolished 1957	xx
Hawaii	Abolished	Abolished 1957	xx

Note: xx signifies that the death penalty was illegal.
"Legal" designates that the death penalty may be imposed for murder.

[1] Prior to June 19, 1937, Federal law required that all Federal executions be carried out by hanging. From that date on, executions ordered by the Federal Courts were carried out in accordance with the method used by the State in which the sentence was imposed. If the laws of the State prohibit capital punishment, the Federal court designates another State in which the sentence is to be carried out.

Source: National Prisoner Statistics, Capital Punishment 1971–72 (December, 1974), pp. 57–58.

Court faced the issue squarely and ruled, by a vote of six to three, that capital punishment administered by so-called "standardless juries" was not in violation of the "equal protection" clause of the fourteenth amendment. However, two years later, in *Furman* v. *Georgia,*[5] the Court came down on the other side. The subsequent status of the death penalty was chiefly a consequence of the *Furman* ruling.

Meanwhile, during the 1960's, court congestion and the liberalization of constitutional law permitting federal habeas corpus appeal of state court criminal convictions, along with a growing reluctance to execute death sentences, led to a slow but steady growth each year in the number of persons awaiting execution. In June, 1972, when the *Furman* ruling was announced, there were some 630 persons on "death row" in 32 states. After *Furman,* all but a handful of these 600 were resentenced to life imprisonment. However, reenactment of post-*Furman* death statutes quickly led to new convictions and death sentences in many states. By July, 1976, when the Supreme Court announced its decision in *Gregg* v. *Georgia** and related cases, more than 500 persons were under death sentence.

The annual number of persons under sentence of death since 1960 is shown in Table 3. During the past 15 years, persons have been sentenced to death in this country roughly at the rate of about two per week, except during 1972–1973, when most death penalty statutes were invalid under the *Furman* ruling and no new death penalty statutes had been enacted. In 1974, with new mandatory death penalty statutes in force, persons were being sentenced to death at a rate of about three per week, the highest in over a generation.

THE FURMAN RULING

On June 29, 1972, the Supreme Court announced that "the imposition and carrying out of the death penalty . . . constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[6] Directly at issue was the question whether the death penalty for felony murder and for rape, when imposed by a jury having complete discretion to mete out either death or imprisonment, was permissible under the federal constitution. To make the nationwide impact of its decision unmistakable, the Court also summarily reversed death sentences in some 120 other cases from 26 states, encompassing an enormous range of capital statutes, capital crimes, criminal motivations and circumstances.

However, in the aftermath of the Court's decision, many commentators made much of the narrowness of the victory and the lack of firm consensus among the five-man majority of the Court. Yet there were several points of agreement. All five (Justices William J. Brennan, William O. Douglas, Thurgood Marshall, Potter Stewart and Byron R. White) agreed that the death penalty is a "cruel and unusual punishment" because it is imposed infrequently and under no clear standards, with a resulting arbitrariness in who is executed and who is sentenced to prison. They also agreed that the purpose of the death penalty, whether it is retributive or deterrent, cannot be achieved when it is so rarely and unpredictably employed. Even the dissenters (Chief Justice Warren E. Burger, and Justices Harry A. Blackmun, Lewis F. Powell, Jr., and William H. Rehnquist), with one exception (Rehnquist), indicated personal opposition to capital punishment. Among the majority, only two (Brennan and Marshall) went so far as to declare that the death penalty was unconstitutional as such no matter how it was administered. All the rest of the Court, however, clearly indicated that the constitutionality of the death penalty per se was not squarely presented by the issues in *Furman,* and that the decision on that issue was therefore reserved for an undetermined later date. Nevertheless, it was clear that *Furman* v. *Georgia* brought to an end the system of capital punishment prevailing throughout the nation, and that no further death sentences could be issued until drastic statutory revisions were undertaken.

THE REACTION TO FURMAN

At least in the abstract, two main types of death penalty statutes seemed not inconsistent with the *Furman* ruling. One sort would make the death penalty *mandatory,* thereby eliminating at a stroke the discretion in sentencing that had been the focus of attack by the *Furman* majority. The other alternative was to enact statutes that laid down *strict guidelines* for trial courts to follow in sentencing. The chief device to this end would be the provision by statute of a list of "aggravating" circumstances and another list of "mitigating" circumstances plus the requirement, for instance, that the convict could be sentenced to death only if the court found at least one "aggravating" and no "mitigating" factors in the crime. (Typically, a "bifurcated trial" is also required under these statutes, with sentence determined at a separate and later deliberation by the trial jury after the guilt-determination phase of the trial is completed.)

Legislatures were quick to follow one or the other of these two paths; within less than four years, most states had reintroduced the death penalty, and (in all but a few) one or more persons had been sentenced under them.

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* For excerpts from *Gregg* v. *Georgia,* announced as this issue went to press, see pp. 30 ff.

[5] 408 U.S. 238 (1972).

[6] 408 U.S. 238 (1972), at 238–239.

State appellate courts and the lower federal courts were reluctant to extend or amplify the Supreme Court's ruling in *Furman*. True, *Furman* was anticipated in a somewhat narrow ruling by the Circuit Court of Appeals in 1970 in *Ralph* v. *Warden,*[7] in which a Maryland death sentence for rape was overturned as "cruel and unusual punishment." A far more sweeping ruling was provided by the California Supreme Court just four months prior to *Furman*. In *People* v. *Anderson,*[8] the California state constitution was held to provide that the death penalty was per se unconstitutional. (This became a Pyrrhic victory, because nine months later the people of California by initiative overwhelmingly voted to restore the death penalty and to deny judicial review of this reinstatement.)

Only in Massachusetts, in two cases, was *Furman* significantly extended. In *Commonwealth* v. *A Juvenile,*[9] decided in 1974, the Massachusetts Supreme Judicial Court held that in circumstances where the death penalty was a possible outcome, a death sentence that rested on pre-conviction discretion by the trial court over prosecution involving a juvenile could so adversely affect the defendant's rights as to be inconsistent with *Furman*. Then, late in 1975, in *Commonwealth* v. *O'Neal,*[10] the Massachusetts court went further and held that the state's mandatory death penalty for felony murder rape was unconstitutional under the Massachusetts state constitution.

These rulings in California and Massachusetts were highly atypical. At the other extreme was the response of the state supreme courts in Delaware and North Carolina.[11] There, the *Furman* ruling was given the interpretation that it only nullified jury-sentencing discretion in capital cases, thereby leaving intact all the state death penalty statutes and making them mandatory in application, and requiring resentencing to death of all those under death sentence prior to the *Furman* decision. Elsewhere, in the vast majority of the states, *Furman* was interpreted as routinely requiring resentencing to imprisonment of all persons then under death sentence. In these jurisdictions, state appellate courts did little to show that they regarded any of the post-*Furman* death penalty statutes as unconstitutional.

TABLE 2: Executions by Race of Offender and by Offense, 1930–1970 (Intervals of Five Years)

Year	Total Executions	Race: White	Race: Non-White	Offense: Murder	Offense: Rape	Offense: Other
1930	155	90	65	147	6	2
1935	199	119	80	184	13	2
1940	124	49	75	105	15	4
1945	117	41	76	90	26	1
1950	82	40	42	68	13	1
1955	76	44	32	65	7	4
1960	56	21	35	44	8	4
1965	7	6	1	7	0	0
1970	0	0	0	0	0	0

Source: National Prisoner Statistics, Capital Punishment 1974 (November 1975), p. 17.

TABLE 3: Death Sentence Prisoners, 1960–1976

Year	Total Under Death Sentence*	Received Death Sentence During Year
1960	190	113
1961	219	140
1962	266	103
1963	268	93
1964	298	106
1965	322	86
1966	351	118
1967	415	85
1968	434	102
1969	479	97
1970	524	127
1971	607	104
1972	620	75
1973	329	42
1974	158	151
1975	187	**
1976	411	**

* As of January 1: ** Not Available

Sources: For 1960, National Prisoner Statistics, Executions 1960 (March, 1961), p. 1.
For 1961–1974, National Prisoner Statistics, Capital Punishment 1974 (November, 1975), p. 22.
For 1975–1976, NAACP Legal Defense Fund, Inc., memoranda.

During 1974, the Supreme Court agreed to review its first post-*Furman* death penalty case, *Fowler* v. *North Carolina.*[12] After receiving briefs and hearing oral arguments, the Court declined to decide the case and ordered it held over for further deliberation during the 1975 term. Then, on January 22, 1976, the Court announced that five additional death penalty cases were scheduled for argument.[13] These cases brought before the Court a variety of post-*Furman* death penalty statutes from Texas, North Carolina, Louisiana, Florida, and Georgia. In several, the defendants were black; all were male and all involved the crime of felony murder.

On July 2, 1976, the Supreme Court ruled spe-

[7] 438 F.2d 786 (4th Cir. 1970).
[8] 6 Cal. 3d 628, 493 P. 2d 880, 100 Cal. Rptr. 152 (1972).
[9] ——— Mass. ———, 300 N.E.2d 439 (1973).
[10] ——— Mass. ———, 339 N.E.2d 676 (1975).
[11] ——— Del. ———, 298 A.2d 761 (1972); 282 N. C. 431, 194 S.E. 2d 19 (1973).
[12] 285 N.C. 90, 203 S.E.2d 803, *cert. granted sub nom. Fowler* v. *North Carolina,* 419 U.S. 963 (1974), restored for reargument, 95 S. Ct. 2652 (1975).
[13] *Gregg* v. *Georgia,* No. 74-6257; *Jurek* v. *Texas,* No. 75-5394; *Woodson and Waxton* v. *North Carolina,* No. 75-5491; *Proffitt* v. *Florida,* No. 75-5706; *Roberts* v. *Louisiana,* No. 75-5844. The Court's decisions in these cases were announced July 2, 1976. (See pp. 30ff. of this issue.)

cifically that "the punishment of death does not invariably violate the Constitution." Provisions for the death penalty in Georgia, Florida and Texas were ruled constitutional; the blanket mandatory provisions for capital punishment in Louisiana and North Carolina were ruled unconstitutional.

In the 7 to 2 decision of *Gregg* v. *Georgia*, the Court pointed to "the limited role" of the judiciary and declared that the issue of capital punishment involved questions of social mores and legislative judgment. "In assessing a punishment by a democratically elected legislature against the constitutional measure, we presume its validity," declared the Court, pointing out that "the imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and England."

THE ALTERNATIVES

All the moral and social issues involved in the use of the death penalty are still undecided. What policy should society adopt to punish murder and other serious crimes? Looked at in the largest perspective, there are three major alternatives. The first policy alternative is to authorize capital punishment for all the gravest crimes and all the most dangerous offenders. Let us call this the mandatory alternative. The second alternative is to authorize capital punishment for some of these crimes and some of the offenders who commit them. Let us call this the discretionary alternative. The third is to have capital punishment for none of these crimes and offenders. This, of course, is the abolitionist alternative. On this alternative, the most severe punishment the law would allow would be incarceration of convicted dangerous offenders. This would include imprisonment for life in the rare cases where it is necessary, as well as eligibility for parole and administrative review on a reliable and predictable schedule.[14]

Capital punishment for all the most serious crimes and all the most dangerous offenders has several apparent merits: it would appear to maximize retribution; it would also appear to maximize deterrence; and it would secure equal justice for all by visiting the same severe punishment upon all the deserving dangerous offenders. In view of the *Woodson* v. *North Carolina* decision (1976), this alternative is probably unconstitutional.

However, there are other objections to this alternative. First, it would require agreement on what the most serious crimes are. Yet the American public and their state and federal legislatures are incapable of agreeing on the most serious crimes; at no time in our history have any two jurisdictions had the same definitions, criminal statutes and procedures for the use of capital punishment.[15] As our history shows, Americans have experimented with the mandatory death penalty (it was one of our many inheritances from English criminal law), and (prior to 1972, with a few eccentric exceptions) have abolished it.[16] This alternative requires us to turn back the clock in an impossible manner. To adopt this alternative we would also have to abolish the familiar distinction between degrees of murder (another American invention intended to mitigate the rigors of the death penalty). Every study of criminal homicide in this country shows that what the courts decide is first degree murder in a given jurisdiction on a given day could as plausibly be regarded as second degree murder in a neighboring jurisdiction on another day.[17]

In addition, prosecutors and trial judges would have to be denied the power to accept pleas to lesser offenses where the gravest crimes are involved, despite the fact that our crowded criminal trial calendars require negotiated pleas in most criminal homicide cases. Finally, it would be necessary to remove from the chief executive the traditional power to commute death sentences, except in order to correct gross and manifest error at the trial court level.

In light of the current administration of our systems of criminal justice and the history of their development, the changes required for the institution of a mandatory death penalty would call for a *total revolution* in the administration of justice.

The chief merit of the discretionary alternative is its familiarity. By and large, in this century capital

(Continued on page 34)

[14] See Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974); and Andrew von Hirsch, *Doing Justice* (New York: Hill & Wang, 1976).

[15] See Leonard D. Savitz, "Capital Crimes as Defined in American Statutory Law," *Journal of Criminal Law, Criminology and Police Science,* vol. 46 (1955), pp. 355–363.

[16] See Maynard Shipley, "Does Capital Punishment Prevent Convictions?" *American Law Review,* vol. 43, (May–June, 1909), pp. 321–334; and Philip English Mackey, "The Inutility of Mandatory Capital Punishment: An Historical Note," *Boston University Law Review,* vol. 54 (January, 1974), pp. 32–35.

[17] See Herbert B. Ehrmann, "The Death Penalty and the Administration of Justice," *The Annals,* vol. 284 (November, 1952), pp. 73–84; H. A. Bedau, "Felony Murder Rape and the Mandatory Death Penalty: A Study in Discretionary Justice," *Suffolk University Law Review,* vol. 10 (Spring, 1976), pp. 493–520; and Frank Zimring, Shelia O'Malley, and Joel Eigen, "The Going Price of Criminal Homicide in Philadelphia," *University of Chicago Law Review,* vol. 43 (Winter, 1976), forthcoming. The Bedau and Zimring et al. essays are reprinted in H. A. Bedau and C. M. Pierce, eds., *Capital Punishment in the United States* (New York: AMS Press, 1976).

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Free Press and Fair Trial: The Volcano Erupts

By Donald M. Gillmor
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"I presume the judges would like the trial to be held on Guam or in the Bavarian Alps before a jury which speaks no English and knows no American customs."

Reg Murphy, kidnap victim
and editor-publisher of the
*San Francisco Examiner**

"If jurors must be shielded from inadmissible evidence printed in newspapers, it is far easier to sequester the jury than it is to sequester the whole society."

Thomas Powers in *Commonweal*,
November 21, 1975, p. 564

On October 18, 1975, in the tiny prairie town of Sutherland, Nebraska, 30-year-old Erwin Simants raped 10-year-old Florence Kellie, a neighbor, shot her to death, then murdered all possible witnesses: her grandparents, her father, a 5-year-old brother, and a 7-year-old sister. At Simants' arraignment on six counts of first degree murder a few days later, North Platte County Judge Ronald Ruff issued a broad order restricting news coverage of public pretrial proceedings. He took this action despite judicial advice to the contrary, remembering the Supreme Court's stinging rebuke of the trial judge in the Sam Sheppard case. Because of an alleged confession and incriminating medical tests, the judge feared that publication might affect the fairness of the accused's later trial.

Nebraska news organizations immediately protested what they considered an unconstitutional order.

Within nine days the case had moved up to a district trial court in Lincoln, where Judge Hugh Stuart had imposed a no less restrictive rule forbidding the news media to report confessions or "other information [growing out of the pretrial hearings] strongly implicative of the accused as perpetrator of the slayings." Journalists were to be screened by the judge to determine their "suitability" to be present in the courtroom.

As part of his order, Judge Stuart adopted the Nebraska Press-Bar Guidelines[1] and "clarified" them to fit his own interpretation of what they ought to mean. He then forbade the press to describe in full the nature of the limitations contained in his order. In effect, a "gag" was put on the "gag" order itself.

To the horror of those journalists who had long preached compromise with bar and bench, voluntary guidelines had become part of a formal judicial order. Reporters, refusing to abide by Judge Stuart's restrictions on coverage, boycotted the jury selection process, and most of the evidence presented at the preliminary hearing went unreported.[2]

Nebraska media, joined now by national press groups, pressed on to the state supreme court, giving that body a 120-hour ultimatum to provide extraordinary relief. But the state supreme court was in no hurry and would not promise a ruling in the case before February, 1976. The next step was an appeal to United States Supreme Court Justice Harry Blackmun who is Circuit Justice—a kind of constitutional

* A three-judge panel of the 5th Circuit Court of Appeals overturned the conviction of Murphy's abductor, William Williams, on grounds of pretrial publicity, part of which came from Murphy's own account of his kidnapping. At the time of his abduction, Murphy was the editor of the *Atlanta Constitution*.

[1] The Nebraska Press-Bar Guidelines recommend that confessions or other statements of the accused should not be disclosed unless they have been made to the press or the public directly, that opinions as to the guilt of the accused, predictions as to the outcome of a trial, results of examinations and tests, statements concerning the anticipated testimony of witnesses, and statements made in court but out of the presence of the jury which, if reported, would likely interfere with a fair trial should also not be reported. And criminal records are generally to be avoided.

[2] In some states preliminary hearings can be closed at the discretion of the judge or on motion of either party. Ironically, pretrial proceedings *must* be open in Nebraska.

supervisor for the region. On November 13, in an almost unprecedented order, Blackmun told the Nebraska Supreme Court to consider the case "forthwith and without delay," since freedom of the press, a basic constitutional right, was probably being violated.

The Nebraska Supreme Court, noting that the press was seeking concurrent relief from the United States Supreme Court, thought it better not to do anything. A few days later, in what is known as a chambers opinion, Justice Blackmun said that he would postpone issuing or denying a stay of the original court order until the state supreme court had acted.[3]

The judicial minuet was not over. Five days after Blackmun's opinion had come down, the Nebraska Supreme Court set November 25 to hear arguments. Appalled at how much time was passing, the press filed a reapplication for a stay with Justice Blackmun. On November 20, finding that Nebraska court delays had exceeded "tolerable limits," Blackmun handed down a second chambers opinion in which he granted the press a partial stay of the original October 27 court order.

Blackmun told Judge Stuart that the language of his order having to do with the accused's criminal record, i.e., "should be considered very carefully" and "should generally be avoided," was too vague for first amendment purposes, and that those parts of the order prohibiting the reporting of the details of the crime, the identities of the victims, or the testimony of the pathologist at a preliminary hearing open to the public had not been justified. But the rest of the order stood.[4] Thunderstruck at this outcome, the media asked the full United States Supreme Court to strike down what was left of Judge Stuart's restrictive order.

Meanwhile, the Nebraska Supreme Court had heard arguments in the case on November 25 as scheduled. Still reluctant to exercise concurrent jurisdiction with the United States Supreme Court, in a 5–2 decision, the Nebraska Supreme Court nevertheless upheld the crucial parts of the original order.[5] Noting that "under some circumstances prior restraint may be appropriate," the state court relied on a snippet of Justice Byron White's opinion for the Court in *Branzburg* v. *Hayes* that

> Newsmen . . . may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.[6]

The Nebraska Supreme Court believed that "clear and present danger" to a fair trial in North Platte, Lincoln and Denver overcame "the heavy presumption of unconstitutionality of the prior restraint." But the Nebraska court's analysis did not offer any evidence of how press coverage influenced jury verdicts or any consideration of whether rumors were better for prospective jurors than facts. Any absolutist assumptions about freedom of the press were rejected.

The state supreme court agreed with Justice Blackmun that voluntary guidelines were not intended to be contractual or mandatory and could not be enforced as though they were. That part of Judge Stuart's order was again held void. But any confession or information implying guilt was not to be published. It is clear that the Nebraska Supreme Court was greatly influenced by Justice Blackmun's second chambers opinion.

Although Blackmun's ruling was binding only in the Nebraska case, press organizations feared it would be used as a precedent by other judges. In a public statement, the Associated Press Managing Editors characterized the order as an unconstitutional prior restraint that would give judges the authority to edit the news, and they compared the Nebraska case with the *Pentagon Papers* case,[7] except that the monumental issues in the latter had been resolved in the space of two weeks.

On December 12, 1975, the United States Supreme Court agreed to review Justice Blackmun's order, but not with the speed Justices Thurgood Marshall, William Brennan and Potter Stewart thought necessary. The three dissenters would have granted motions to expedite and to lift the Nebraska Supreme Court's order pending final resolution. Justice Byron White would at least have permitted publication of the information that had been disclosed in public at the original October 22 pretrial hearing. Blackmun, voting with the four remaining Justices, seemed to have forgotten his own earlier admonition that with

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[3] *Nebraska Press Association* v. *Stuart,* 96 S.Ct. 237 (1975).

[4] *Nebraska Press Association* v. *Stuart,* 96 S. Ct. 251 (1975).

[5] *State* v. *Simants,* 236 N.W. 2d 794 (Neb. 1975).

[6] 408 U.S. 665 (1972). In this landmark case, the Supreme Court held that the first amendment does not bestow upon the journalist the right or the privilege to keep confidential the identity of a source or the raw materials (notes and tapes) of his work. The right of the state to every person's evidence is overriding.

[7] *New York Times* v. *United States, United States* v. *Washington Post,* 403 U.S. 713 (1971). In a historic 6–3 decision, which may prove a Pyrrhic victory for the press, the Court held that the government had not met the heavy presumption against the constitutional validity of a prior restraint on publication. But a majority of the justices implied that the government might be able to meet that standard in the future. That majority may have been prophetic. Congress is presently considering a comprehensive Criminal Justice Reform Act (Senate Bill 1) part of which mandates long prison terms for "mishandling or disclosing national defense information" and the death penalty for "communicating" vital national security information knowingly to a foreign power. "Communicating" seems to be synonymous with publishing. The question is, do such severe penalties have the same effect on the work of the journalist as outright prior restraints?

each passing day there is a "separate and cognizable infringement of the First Amendment."[8]

Erwin Simants was convicted on six counts of first-degree murder on January 18.

In 1975, the Court had been generally unresponsive to criminal appeals based on prejudicial publicity. In an 8–1 decision, for example, it affirmed the robbery conviction of Jack Roland Murphy ("Murph the Surf") in spite of what the defendant charged was inflammatory publicity and prejudiced jurors.[9]

Similar appeals from Louisiana, New York, Illinois, Nevada and Nebraska were denied review by the Court,[10] although some lower courts were suspected of using Justice Blackmun's ruling in the Nebraska case to justify news blackouts in murder trials.[11]

On June 30, 1976, the Court finally ruled unanimously that the Nebraska court's gag rule in the Simants case was an unconstitutional infringement of the first amendment guarantee of a free press. As Chief Justice Warren Burger noted in the decision:

> . . . prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. . . . The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.[12]

The Nebraska case is no more than a qualified victory for freedom of the press; however, it should serve to stanch the flow of judicial gag orders.

A DIALOGUE DISRUPTED

In the early 1970's, journalism and the judiciary seemed to be moving toward an accommodation of one another's professional values. A dialogue was focused on bilateral codes of conduct governing criminal proceedings. By 1974, at least 24 states[13] had developed press-bar councils. Professional organizations on both sides of the issue had publicly expressed concern for "the co-equal rights of a free press and a fair trial," and had agreed that, while the public has a right to be informed, certain kinds of information might result in unfairness to a defendant.

A 1970 survey of prosecuting attorneys, bar association leaders, editors and broadcast news directors indicated that the perennial conflict between first and sixth amendment rights had been alleviated. Law enforcement officers were changing their publicity practices and, with some notable exceptions, editors were holding back on publication of potentially prejudicial information that came into their hands.[14]

The situation may not have been as encouraging as it appeared. Hardliners in both journalism and the judiciary were uncomfortable with compromise. A small percentage of lawyers and judges were convinced that only criminal sanctions or the exclusion of the press from the courtroom would protect fair trial; and some journalists saw the press-bar council as a way to emasculate first amendment rights.

The break came in a 1971 Baton Rouge murder-conspiracy case. At a preliminary hearing designed to determine whether the state had a legitimate motive in prosecuting a VISTA worker on a charge of conspiring to murder the city's mayor or whether its action was based on racial prejudice, a United States district court judge prohibited the publication of testimony taken at a public hearing. Reporters ignored the order, wrote their stories, and were found guilty of criminal contempt. They protested to the Fifth Circuit Court of Appeals.

In what may have been the turning point in press-bar cooperation, that court upheld the convictions. The appellate judges, avoiding first amendment questions altogether, argued that although the district court's order was constitutionally invalid it should have been obeyed, pending appeal.[15] The United States Supreme Court declined to review the case, and the dam seemed to have burst. Newspapers around the country were soon deluged with what journalists called "gag" orders, although courts termed them "protective" orders. In 1975 alone, there were 25 of these orders, closing courts, sealing the names of jurors and witnesses, criminal records and records of arrest, and forbidding the publication of information on exhibits introduced in open hear-

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[8] *Nebraska Press Association* v. *Stuart,* 96 S.Ct. 557 (1975).

[9] *Murphy* v. *Florida,* 421 U.S. 794 (1975).

[10] See the Reporters Committee for Freedom of the Press, *Press Censorship Newsletter No. 8,* October–November, 1975, pp. 42–45.

[11] "Appeals Court Vacates N.Y. Murder Trial Gag," *Editor & Publisher,* February 7, 1976, p. 8. The Ohio Supreme Court lifted a gag order on the *Akron Beacon Journal* 48 hours after it was imposed.

[12] For the most part, the Court ruled, judges may not forbid reporters from reporting details in a criminal case. Three judges stated that prior restraints on the press are always unconstitutional. Six judges said that in exceptional circumstances prior restraints might be constitutional. *Nebraska Press Association* v. *Stuart* No. 75–817 (1976).

[13] The states are Arizona, California, Colorado, Idaho, Kentucky, Louisiana, Massachusetts, Missouri, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington and Wisconsin.

[14] J. Edward Gerald, "Press-Bar Relationships: Progress Since *Sheppard* and *Reardon,*" *Journalism Quarterly,* vol. 47, no. 2 (Summer, 1970), pp. 223–232. See also Donald M. Gillmor, "Crime Reporting: From Delirium to Dialogue," Current History, vol. 61, no. 359 (July, 1971), pp. 27–34.

[15] *United States* v. *Dickinson,* 465 F. 2d 496 (5th Cir. 1972). *Dickinson* is the only case in state or federal jurisdictions holding the press in contempt for violating an order not to print. It is based on what is called the doctrine of collateral attack, a doctrine promulgated for the federal courts in *United States* v. *United Mine Workers of America,* 330 U.S. 258 (1940) and extended in *Walker* v. *Birmingham,* 388 U.S. 307 (1967), the case upon which *Dickinson* rests. Simply stated, the doctrine means that disobedience of a void or invalid court order will not be permitted, even if the order violates the first amendment.

ings. At least six reporters had violated judicial orders not to publish; several had gone to jail.

Nevertheless, a majority of the newspaper appeals against restraining orders have been upheld. In a notable example, a New Orleans judge forbade the *Times-Picayune* to print anything about a murder trial from pretrial hearings to jury selection or, during the trial, to publish interviews with witnesses, the defendant's background, leaks, statements or conclusions of police or attorneys, editorial comment, and anything stricken from the record. Acting on the newspaper's application for relief the day it was sought, the Louisiana Supreme Court refused to void the "gag" order. So did the Fifth Circuit Court of Appeals. Finally, Supreme Court Justice Lewis Powell granted the newspaper a stay of the order, which he regarded as an impermissible and significant prior restraint on the press.[16]

It may be important to distinguish prior restraints issued by state courts and those issued by federal courts. Until it is overruled, *Dickinson* and the federal cases upon which it rests seem to hold that no disobedience of a void order will be permitted, even if the order violates the first amendment. State law favors an attack on such orders, particularly when they violate state constitutional guarantees.

In *State ex. rel. Superior Ct. of Snohomish Co.* v. *Sperry*,[17] for example, the issue was whether a newspaper may constitutionally be prohibited in advance from reporting a public judicial proceeding. The Washington Supreme Court said that there is no duty to obey a patently unconstitutional court order, and that a contempt citation based on that order was invalid. The court argued that the mere possibility of prejudicial matter reaching a juror outside the courtroom does not override freedom of expression.

If a reporter must disobey a written federal court order directed specifically to him, he ought at least to move toward the appeals process before doing so, even if he only places a phone call.[18] *Dickinson* implies that such an appeal will get speedy review.

Whether reporters ought to be consulted before "gag" orders are issued is a question that divides both lawyers and journalists. At the insistence of the Washington-based Reporters Committee for Freedom of the Press, the American Bar Association (ABA) proposed that no such order should be issued without the media receiving prior notice, the right to be heard, and an opportunity for speedy appellate review. Direct restraints on the press should generally be avoided and special orders ought to be tailored to the specific circumstances of the criminal trial.[19]

Communication lawyers and most journalists reject any procedure, no matter how fair, which sanctifies prior restraints.[20]

Some press organizations have demanded that, at the very least, the ABA guidelines should make some provision for the automatic stay of a contested "gag" order until it is reviewed on appeal, or should provide for postponement of a criminal trial pending review of the order. And they complain that the ABA's standard of a "reasonable likelihood that prejudicial publicity will prevent a fair trial" does not come anywhere near the more stringent "clear and present danger" test of federal contempt cases.[21]

Dickinson and this line of cases do not deal with the extent to which contempt convictions affect future reporting: is the threat of a contempt citation an indirect form of prior restraint?

On February 15, 1976, the ABA committee recom-

(Continued on page 33)

Donald M. Gillmor is the author of *Free Press and Fair Trial* (Washington, D.C.: Public Affairs Press, 1966) and (with Jerome A. Barron) *Mass Communication Law: Cases and Comment*, 2d ed. (St. Paul: West Publishing Co., 1974). In the mass communication and society area, he is particularly interested in mass media effects, organizational theory, popular culture, and the literature of reform.

[16] *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301 (1974). An examination of cases going back to 1893 supports the proposition that the gag-order-form of prior restraint has not found favor with the courts and that contempt convictions based upon such orders are frequently reversed on appeal. See, for example, *In re Shortridge*, 99 Cal. 526, 34 Pac. 227 (1893); *Ex Parte Foster*, 44 Tex. Cr. R. 423, 71 S. W. 593 (1903); *Ex Parte McCormick*, 129 Tex. Cr. R. 407, 88 S. W. 2d 104 (1935); *Phoenix Newspapers Inc.* v. *Superior Court*, 101 Ariz. 257, 418 P. 2d 594 (1966); *State* v. *Morrow*, 57 Ohio App. 30, 11 N. E. 2d 273 (1937); *Ithaca Journal News, Inc.* v. *City Court of Ithaca*, 58 Misc. 2d 73, 294 N.Y.S. 2d 558 (1968); *Johnson* v. *Simpson*, 433 S. W. 2d 644 (Ky. 1968); *Wood* v. *Goodson*, 485 S. W. 2d 213 (Ark. 1972); *Sun Company of San Bernardino* v. *Superior Court*, 105 Cal. Rptr. 873, 29 C.A. 3d 815 (1973); *Younger* v. *Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); *Oliver* v. *Postel*, 282 N.E. 2d 306 (N.Y. 1972); Cal. Rptr. 225 (1973).

[17] 483 P. 2d 608 (Wash. 1971).

[18] The Columbia Broadcasting System was upheld when it appealed a federal district court "gag" order covering the personal injury trial resulting from the Kent State slayings. The Sixth Circuit Court of Appeals, recognizing a right to gather news, held that prior restraints must rest on substantial evidence of "a clear and imminent danger" to the fair administration of justice. But the district judge, said the Court of Appeals, was not required to confer with media representatives before deciding how the trial should be conducted. *CBS, Inc.* v. *Young*, 522 F. 2d 234 (6th Cir. 1975).

[19] American Bar Association Legal Advisory Committee on Fair Trial and Free Press, *Preliminary Draft Proposed Court Procedure For Fair Trial-Free Press Judicial Restrictive Orders* (July, 1975), p. 5; and revised *Recommended Court Procedure To Accommodate Rights of Fair Trial and Free Press* (December 2, 1975).

[20] James C. Goodale, "Prior Restraints, Fair Trial-Free Press," in *Communications Law 1975* (New York: Practicing Law Institute, 1975), p. 25.

[21] American Newspaper Publishers Association, News Release, Feb. 13, 1976.

"Most Americans believe that laws that prohibit concealed weapons are fair. . . . This is not what the advocates of gun control legislation mean. . . . They advocate the registration and the eventual confiscation of firearms."

Against Comprehensive Gun Control

By John M. Ashbrook
United States Representative from Ohio

Every few years there is a renewed call for legislation dealing with firearms. Often the proposed legislation would further restrict the right of law-abiding American citizens to own and use firearms. Such legislation is usually proposed in the hope that it will help put an end to violent crime; so-called gun control is viewed as crime control. But it is a serious mistake to confuse the two.

Let us define the terms. The sloganeers throw the words "gun control" around as if everybody knows what they mean—as if good citizens are for gun control and bad citizens are against it. In fact, every American I know is for some form of gun control. No one favors allowing people to walk the streets with Thompson submachine guns. Nor does the average citizen need a howitzer or an anti-tank bazooka. Most Americans believe that laws that prohibit concealed weapons are fair. The list could go on and on. This is not what the advocates of gun control legislation mean, however. They advocate the registration and the eventual confiscation of firearms.

The right (and in some societies, the duty) of citizens to own arms is of long standing. As early as the thirteenth century, the English Parliament upheld the right of Englishmen to keep and bear arms.

In his *Commentaries,* an important basis for our founding fathers' understanding of English law, William Blackstone, the English jurist, pointed to the importance of the right to keep and bear arms, a right that is the final recourse of free men against tyranny.

This right, of course, played an important role in the American Revolution. In his book, *Our Vanishing Freedom,* James B. Whisker writes, "the first clash between Colonists and British forces came about as a result of Americans' defense of their right to keep and bear arms."[1] It was British General Thomas Gage's attempt to remove military supplies kept by the colonial militia that helped start the American Revolution.

The second amendment to the United States Constitution speaks of the right of the people to keep and bear arms. Constitutions of the original 13 states also recognized the right. During the nation's westward expansion, the right to own firearms was well recognized.[2]

In addition to the provisions of the U.S. constitution, constitutions of over 75 percent of the states recognize an individual's right to keep and bear arms.

Gun control is frequently advocated as a means of reducing crime. Certainly, almost every American would like to reduce the amount of criminal activity in this country. There is no reason to believe, however, that gun control will result in crime control.

There are already more than 20,000 gun laws in existence at the federal, state and local levels. Many of these laws have been enacted in the last few years in an effort to bring crime under control. Despite all these laws, the crime rate has continued to escalate.

In fact, proponents of gun control legislation cannot point to any city or state that has reduced crime by adopting a gun law, regardless of the many gun laws on the books. It is interesting to note that, according to Federal Bureau of Investigation crime reports, approximately 20 percent of all the murders in the United States take place in New York City, Chicago, Detroit and Washington, D.C. Each of these cities has very stringent firearms laws. Why has gun control failed in those cities?

Gun control advocates respond that either the laws are not strong enough or that weak laws in surrounding jurisdictions make it easy to get around the laws. But New York City, for example, has one of the strongest gun control laws in the nation. There is a virtual handgun prohibition; only some 500 hand-

[1] James B. Whisker, *Our Vanishing Freedom,* 2d ed. (Skokie, Ill.: Publishers' Development Corp., 1973).

[2] For a more detailed treatment of the historical and constitutional bases for the right to own firearms, see *ibid.*

gun permits are issued to persons not involved in law enforcement. Nevertheless, in 1973, New York City had almost twice as many murders with handguns and more than four times as many robberies with handguns as the rest of the country, on a per capita basis.

Proponents of gun control blame Ohio and other states with minimal gun laws for the high crime rates in New York City and Detroit. They believe that the availability of firearms causes crime. If this were the case, a state like Ohio, with minimal firearms laws, would have a far higher crime rate than states where guns can be obtained only by illegal purchases. In actuality, however, Ohio has a far lower murder and robbery rate than either New York or Michigan.

The excuse that guns from areas with weak laws account for the failure of New York City's firearms laws collapses on other grounds. It should be kept in mind that it is a violation of federal law for a person to buy a handgun outside his state of residence or for a person to sell a gun to a non-resident. In addition, it is a violation of state law for any New Yorker to import, carry or possess an unlicensed gun. Why will another federal law be obeyed when all the others have not?

The truth of the matter is that people who commit crimes like murder and robbery are not going to worry about a gun-licensing or registration law. Criminally minded individuals will always be able to procure guns—regardless of firearm laws. It is the law-abiding citizens who will lose their right to gun ownership. And it is the law-abiding citizens who are not going to commit murder and bank robbery anyway.

Charles Lee Howard, who has been serving time in the Ohio State Penitentiary, might well be called an expert on this subject. Howard has written:

> It's baffling that the people who want to prevent criminals like me from getting hold of guns expect to accomplish this by passing new laws. Do they forget that the criminal makes a business of breaking laws? No criminal would obey a gun law while committing a crime of equal or greater seriousness.[3]

The lesson of Charles Lee Howard should be clear to everyone. Any person willing to risk the penalties for murder, burglary or assault is not going to worry about the penalty for possessing an unauthorized weapon.

In short, it is naive to think that legislation to register or otherwise make it difficult to acquire firearms for legitimate purposes would in any way impede the unlawful conduct of the criminal or would prevent him from securing a gun. This position is backed by the California Peace Officers Association, which in 1969 stated:

> We have been unable to discover any evidence which would indicate that there is any direct relationship between the registration of firearms or the licensing of gun owners and the reduction in crime committed by the use of firearms.[4]

It is also supported by the National Sheriffs' Association, which has said:

> There is no valid evidence whatsoever to indicate that depriving law-abiding American citizens of the right to own arms would in any way lessen crime or criminal activity. . . . The National Sheriffs' Association unequivocally opposes any legislation that has as its intent the confiscation of firearms . . . or the taking away from law-abiding American citizens their right to purchase, own and keep arms.[5]

Other police officials have also made statements on the issue. The chief of police of Los Angeles, California, had the following to say on more firearm legislation:

> My views on gun control and the rights of individual gun ownership are well known. Some people seem to believe that if you legislate against handguns you will reduce murders and other gun-related crimes. That whole idea is absurd. We have legal restrictions on guns right now, but that doesn't stop the Arthur Bremers from receiving $50 fines or probation.
>
> New York is a good example of a city that has restrictions on handgun ownership. The Sullivan Law has been in effect for several years. Yet, this law seems to only have an impact on the people who are generally law-abiding. The criminals sure don't have any difficulty getting guns.[6]

Chief James Rochford of the Chicago Police Department takes an opposite viewpoint. He favors not only the registration but the outright confiscation of firearms. However, the policemen beneath him differ drastically. A poll of Chicago policemen indicated that 73.5 percent believe that current gun laws are adequate; they do not favor extending gun control laws despite the position of their chief.

In the central portion of Ohio, I took a survey of law enforcement officers. There was overwhelming opposition to the federal registration or confiscation of all firearms. When the question was federal registration of all handguns, there was still overwhelming opposition. By almost a three-to-one margin these officials felt that, if there were to be any more laws dealing with firearms, they should be at the state level rather than at the federal level.

These statements are supported in a comprehensive

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[3] Charles Lee Howard as quoted in John Lee Ashbrook, "Gun Control Legislation," *Congressional Record,* June 27, 1968, p.H 19144.

[4] Lynn D. Compton, "California Police Officers Adopt Gun Control Policy," *Journal of California Law Enforcement* (January, 1969), p. 126.

[5] National Sheriffs' Association, "Resolution," June 23, 1971.

[6] As quoted in "Tough Words on Crime by L.A. Police Chief," *Human Events,* vol. 35, no. 12 (March 22, 1975), pp. 8–9.

study prepared by Alan S. Krug, an economist at Pennsylvania State University. His study, which related FBI crime statistics to state firearms laws, concluded that "there is no statistically significant difference in crime rates between states that have firearms licensing laws and those that do not."[7]

Another myth is the theory that most handgun murders are unpremeditated, spontaneous crimes primarily resulting from family or romantic quarrels. Such killings are frequently labeled "crimes of passion."

A recent study in New York City conducted by the Rand Institute indicates that this is a myth. The study revealed that an upsurge in deliberate murders was responsible for most of the 60 percent increase in homicide in New York City from 1968 to 1974. During that period, homicides rose from 968 a year to 1,554.

The Rand study emphasized that in most murder cases there was no longer a close relationship between the victim and the killer. At most, one out of five involved family members or close friends. The report declared that "We find that the major part of the citywide rise in homicides since 1968 seems to be in deliberate killings."[8]

No one can doubt that crime is a growing industry in the United States. The number of crimes committed in the United States is growing astronomically; since 1960 the crime rate has more than doubled. From 1973 to 1974, there was the largest annual increase—17 percent—in serious crime in the history of our country. According to the latest FBI figures, serious crime increased another 9 percent in 1975. Serious crime includes murder, rape, robbery, aggravated assault, burglary, larceny and auto theft. It is estimated that if unreported crimes were included the total might be three to five times higher in a number of cities.

Terrorism continues to be a threat. We read of terrorist bombings in London and other cities overseas. While not receiving as much media attention, terrorist activities are also continuing in the United States. During 1975, there was an increase in bombings in this country. Sixty-nine people were killed, and 326 were injured. Property damage was over $26 million.

Gun control is indeed needed to control criminals. I have introduced legislation that would make a prison sentence mandatory for anyone convicted of committing a crime in which he used a gun. To quote the chief of the Los Angeles Police Department:

> If we really want to reduce gun-related crimes, all we have to do is require judges to impose an additional penalty on those individuals using guns during crimes. This has a dramatic deterrent effect on other gun-carrying criminals. Your average criminal on the street knows just what society will tolerate. He knows that his sentence will not be any greater, under current judicial practices, if he "packs a piece."[9]

Police officials do not confuse gun control with crime control. The American people have expressed similar views. Decision Making Information, a firm based in Santa Ana, California, recently completed a comprehensive public opinion survey on the issue of gun control.[10] This poll, conducted during September and October, 1975, is based on interviews with more than 1,500 registered voters from all regions of the country.

According to the DMI survey, almost three out of every four Americans feel that crime would not be reduced if Congress forced the people to turn in their guns. Instead, they recommend harsher punishment of criminals as the best way of cutting back on crime.

The survey found that fully 73 percent of the public do not believe that a federal law requiring all guns to be turned in would be effective in reducing crime. When asked to suggest ways to reduce crime, only 11 percent volunteered gun control as a solution. In contrast, by far the most popular suggestion was more severe punishment of criminals (33 percent). Only 1 percent mentioned the registration of firearms, and less than .5 percent suggested a ban on so-called "Saturday night specials."

In addition, 78 percent of the public feel that neither of the two recent attempts to assassinate President Gerald Ford could have been prevented by a national handgun registration law, and 71 percent reject the idea that assassination attempts on public officials could be avoided by banning the private ownership of handguns.

In conclusion, let us look at one of the causes of crime. In my opinion, a major problem is the decline of one of the basic tenets of this country—individual responsibility. Our forefathers believed that

(Continued on page 31)

[7] Alan S. Krug, *A Statistical Study of the Relationship Between Fire Arms Licensing Laws and Crime Rates* (University Park: Institute for Research on Land and Water Resources, 1967). See also Douglas R. Murray, "Handguns, Gun Control Laws and Firearm Violence," *Social Reforms,* vol. 23, no. 11 (October, 1975), pp. 91-93.

[8] Arthur J. Swerse and Elizabeth Enloe, *Homicide in Harlem* (Santa Monica: Rand Institute, 1975).

[9] *Supra,* note 6.

[10] "Public Opinion Survey on Gun Control" (Santa Ana: Decision Making Information, 1975).

John M. Ashbrook is a Republican serving the 17th congressional district of Ohio; he was first elected in 1960. He is on the House Committee on Education and Labor, the House Committee on Judiciary and the Joint Committee on Congressional Operations. As a member of the Joint Committee, he also serves on the Crime Subcommittee, which is responsible for firearms legislation.

". . . the wide proliferation of handguns seems to involve a vicious cycle: more and more people buy guns to protect themselves from more and more people who have guns."

The Need for Gun Control Legislation

By Edward M. Kennedy
United States Senator from Massachusetts

The case for effective firearms legislation can be logically and clearly explained on the basis of the daily tragedies reported in our nation's newspapers. Over 25,000 Americans die each year because of shooting accidents, suicides and murders caused by guns, primarily because too many Americans possess firearms. When guns are available, they have proved to be a far too easily accessible tool for the destruction of human life. Because of the senseless deaths and injuries caused by guns I strongly support the public demand for legislation to provide a uniform, nationwide system to control the abuse and misuse of firearms. A brief review of the conditions involving firearms in this country makes it clear that the proliferation of firearms, particularly handguns, must be halted.

My interest in the need for effective firearms legislation goes back at least to 1963. I have introduced firearms bills in the Senate on several occasions. I offered gun control amendments to pending legislation on the Senate floor. Since I have been in the Senate, I have heard much of the testimony presented by nearly 200 witnesses, during more than 40 days of hearings on gun control. The issues never change. The arguments never vary. The statistics never recede. In 1963, handgun murders totaled 4,200. Eleven years later, in 1974, handguns were used to murder 11,000 Americans. The tragic toll of handgun suicides and accidental handgun deaths pushes the annual figures well beyond reasonable limits for a society that claims to respect life and personal security.

Gun manufacturers produce more guns each year, and American gun deaths increase right along with the output of firearms. Advocates for stronger controls are understandably alarmed by production figures showing that the annual output of handguns increased from 568,000 in 1968 to over 2.5 million in 1974.

Many experts insist that a gun, and particularly a handgun, is such a viciously lethal weapon that no citizen deserves to wield the awesome power of a gun. Our complex society requires a rethinking of the proper role of firearms in modern America. Our forefathers used firearms as an integral part of their struggle for survival. But today firearms are not appropriate for daily life in the United States.

WHY DOES ANYONE ARGUE AGAINST GUN CONTROLS?

The arguments used to oppose gun controls are old and hackneyed. The same lament has been used in one of the following forms time and time again:

First. Gun controls cannot limit the supply of guns enough to reduce violence.

Second. The Constitution protects the citizen's right to bear arms.

Third. There is no need to ban guns because guns are not killers; people do the killing.

Fourth. Criminals will always find a way to obtain guns. Thus, controls will only disarm those who obey the law.

Fifth. Registration and licensing procedures are so cumbersome and inconvenient that they would create unfair burdens for legitimate gun owners.

Opponents of effective gun controls believe that these objections are valid. But a thorough examination of each of these claims reveals that not one of them is well founded.

First, can laws limit the supply of guns enough to reduce violent crime?

Of course, such laws, properly enforced, can reduce the availability of handguns. In 1968, when importers anticipated the enactment of a new gun law, about 1.2 million handguns were rushed into the American market. In 1969, pistol and revolver imports fell to less than 350,000 and have not risen substantially above that total since then.

Today, nearly three million new handguns enter

Table I: Total Number of Homicides and Rate per 100,000 Population

Country (year is the latest for which figures are available)	Total Homicide		Gun Homicide	
	Number	Rate	Number	Rate
United States, 1973	19,510	7.5	11,249	6.2
Australia, 1970	190	1.5	71	.6
Denmark, 1971	48	1.0	12	.2
England and Wales, 1972	384	.8	41	.1
France, 1970	373	.7	124	.2
German Federal Republic, 1971	802	1.3	203	.3
Ireland, 1972	21	.7	———	———
Italy, 1970	442	.8	239	.4
Japan, 1971	1,380	1.3	20	.0
Netherlands, 1972	72	.5	13	.1
New Zealand, 1971	25	.9	8	.3
Scotland, 1972	73	1.4	3	.1
Sweden, 1971	76	.9	19	.2
Switzerland, 1972	57	.9	12	.2

Source: International Statistical Classification of Diseases, Injuries and Causes of Death (Geneva: World Health Organization, 1971, 1972, 1973, 1974).

the American market every year because handgun parts are still legally imported and because American manufacturers are still authorized to produce them. The legislation I have introduced would not only reduce the number of handguns assembled from imported parts, but it would also drastically curtail the output of domestically manufactured handguns.

In June, 1934, President Franklin D. Roosevelt signed the National Firearms Act, which outlawed civilian ownership of machineguns. Perhaps this is the law that best illustrates the way in which legislation can effectively restrain the availability of firearms. Since enactment of that measure over 40 years ago, machineguns have been virtually eliminated in the United States. Obviously, a machinegun has no legitimately useful place in a civilized society. Easily concealed pistols and revolvers are also out of place in today's highly urbanized and complex society.

Opponents of handgun control insist that it is impossible to prevent a criminal from obtaining a handgun. But if a criminal has to steal a gun before he can use a gun, he will use a gun much less frequently.

An effectively enforced ban on the output of these deadly devices is the most direct way to reduce the deaths and injuries caused by guns.

Second, it is claimed that the second amendment to the constitution protects the citizen's right to bear arms. Anyone who believes that "the right to bear arms" is guaranteed in the constitution has conveniently ignored the language of the second amendment, which provides that:

> A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

The United States Supreme Court has repeatedly said that this amendment has nothing to do with the right to personal ownership of guns but only with the right of a state to establish a militia.

In perspective, the purpose of the second amendment emerges clearly. Debates in the first and second Congresses were naturally affected by the recently won independence of the new government. And in Massachusetts it was bitterly recalled that the British Crown had quartered its troops but forbade the organization of a colonial militia. Congressional debates of early Congresses support the view that the second amendment was designed to protect and preserve the state militias. No mention was made of any individual's "right" to possess, carry, or use arms, and there is no indication of any concern with the need to do so. The new government was far more interested in maintaining state militias to defend the hard-won liberty. That fledgling government feared the establishment of a federal standing army as a threat to the basic authority of the several states.

Indeed, in December, 1791, when the Bill of Rights was ratified, all but one of the 14 states of the Union adopted a constitution or a declaration of rights under which their people were governed.

Rhode Island still operated under its charter of 1663, which authorized the colony to organize a militia. But there was no mention of any "right" to bear arms.

Eight states—Delaware, New Jersey, Connecticut, Georgia, South Carolina, Maryland, New Hampshire, and New York—operated under constitutions that made no mention of any "right" to bear arms, although each authorized a state militia.

Three states—Massachusetts, North Carolina, and Virginia—expressly recognized the right of the people to bear arms for the defense of the state.

Two states—Pennsylvania and Vermont—included language in their constitutions which acknowledged that:

The people have a right to bear arms for the defense of themselves and the State.

However, that sentence was included in a paragraph that was concerned with the prohibition against a standing army and the guarantee of civilian control of the militia. Considering the history of the right to bear arms, reason defines the phrase "defense of themselves" as referring only to collective defense. That phrase did not include individual defense.

It appears, therefore, that both the states and the Congress were preoccupied with the distrust of standing armies and the importance of preserving state militias. It was in this context that the second amendment was written and it is in this context that it has been interpreted by the courts.

Third, a common refrain against firearm controls is that "guns do not kill, people do." This argument contends that people who use guns to commit crimes should be dealt with severely but that efforts to control weapons are not necessary. Yet, a glance at the statistics and common sense tell us that it is when guns are in hand that two-thirds of the people who kill other people do so; it was when guns were in hand that over 250,000 robberies were committed in 1973; it was when guns were in hand that one-fourth of the nation's 400,000 aggravated assaults were committed in 1973.

Murder is usually committed in a moment of rage. Guns are quick and easy to use. They are also deadly accurate, and they are all too often readily accessible. It is estimated that there are over 35 million handguns in private ownership in this country. Each year, 2.5 million new handguns are introduced into the marketplace for civilian use. Because handguns are available people use them.

An attacker makes a deliberate choice of a gun over a knife. But because the fatality rate of knife wounds is about one-fifth that of gun wounds, it may be concluded that using a knife instead of a gun might cause 90 percent fewer deaths.

Fourth, others argue that because criminals have guns, gun control will simply disarm law-abiding citizens. Lawless citizens, according to that argument, will not feel obliged to abide by gun restrictions.

Perhaps there is truth in this argument. And for this reason, I am convinced that gun restrictions can be effective in limiting the wholesale misuse of firearms. Strict gun restrictions will aid in disarming anyone who fails to register his weapons or to obtain a license for ownership. Indeed, the enforcement of licensing and registration laws will isolate precisely those citizens who flaunt the law, because such legislation makes it a crime merely to possess an unregistered firearm. The commission of a crime with such a weapon compounds the wrong of any criminal action.

Fifth. It may be that the greatest number who protest gun controls do so because the administrative requirements for registration are cumbersome and inconvenient. Since 1969, Congress has attempted several times to remove the 1968 gun control law's record-keeping requirements with regard to sales of .22 caliber ammunition.

I have repeatedly objected to any move that would eliminate the requirement that sales of such ammunition must be recorded. Between 6 billion and 7 billion rounds of ammunition are produced in this country each year. At least 85 percent of those bullets are .22 caliber. Records maintained to control the sale of ammunition may be useful in restricting access to those gun owners who intend to use their weapons for legitimate purposes.

I believe that any measure that will substantially reduce the misuse of firearms will at the same time enhance whatever pleasures may be derived from the so-called recreational pursuits of gun ownership.

GUNS IN OTHER COUNTRIES

Among the nations of the world, the United States stands in the bloodiest pool of deaths by gunfire. Americans are not only ranked No. 1, but No. 2 lags so far behind that a tally of gun deaths in all civilized nations probably would not equal the excessive fusillade Americans train on their fellow citizens.

In 1973, the total gun murder rate in the United States was 6.2 per 100,000 population. And the handgun murder rate was 4.9. Thus, even the United States handgun murder rate was 62 times the rate in Scotland, the Netherlands, and Great Britain and Japan, 31 times the rate in Denmark, France, Sweden, and Switzerland, and 20 times the rate in New Zealand, Germany and Italy. (See Table 1.)

Among civilized societies that have acted to control guns the United States is a glaring exception. In Italy, West Germany, France, Britain, and the Soviet Union, "the right to bear arms" is a strictly regulated privilege. In Japan, private gun ownership is all but prohibited. Five European countries totally prohibit the private possession of handguns. A 1968 State Department survey of 102 of its diplomatic posts revealed that 29 European countries require either a license to carry a firearm or registration of the ownership or sale of each privately owned firearm, or both.

Legislation to control the violence caused by firearms is essential in a national campaign to reduce

(Continued on page 31)

Edward M. Kennedy was elected to the United States Senate from the state of Massachusetts in 1962. He has served on the Judiciary, Labor and Public Welfare, Special Aging, Joint Economic and Select Nutrition and Human Needs committees.

BOOK REVIEWS

ON JUSTICE

UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA. By Jerold S. Auerbach. (New York: Oxford University Press, 1976. 395 pages, bibliographical essay, notes and index, $13.95.)

Ex-law student and legal historian Jerold Auerbach has written about the abuses perpetrated over the years by the legal profession. He believes that for the most part lawyers have traditionally worked to uphold the status of business and political leadership while neglecting to act as a force for true justice for all; his subject is "the response of elite lawyers to social change in the twentieth century." Lawyers are not more prejudiced than other Americans, but "bias in the legal profession has had particularly serious consequences in a society that depends so heavily upon the legal profession to implement the principle of equal justice under law. . . . Is there equal justice when the legal profession, the primary instrument of its attainment, is structured to reflect and reinforce social inequality?" According to Auerbach, "in the United States justice has been distributed according to race, ethnicity and wealth rather than need. This is not equal justice under law but unequal justice under lawyers."

Lawyers tend to believe that the early country lawyer, modeled after Daniel Webster or Abraham Lincoln, the "common man's" lawyer in the pre-urban society, represented the "golden age" of the profession. The author believes that this tendency to romanticize the past has failed to cope with "contemporary social problems and severely impeded social change." As students and practitioners of centuries of Anglo-Saxon legal development, American lawyers shared a "common cultural experience." By the early 1900's, the corporate lawyer appeared on the scene and brought "professional expertise to the service of particular values and interests in an urban industrial society. . . . Corporation lawyers became the professional men of the new century." Even legal training was geared to the demands of corporate business.

By the 1920's, corporation lawyers were the spokesmen of the profession and were inclined to a strong and active brand of conservative law and order and "patriotism." By 1924, Supreme Court Justice Harlan F. Stone "deplored professional defects that inhibited the ability of the bar to resolve social problems," noting that in a stratified, specialized profession the lawyer no longer served as the "representative and interpreter of his community." The New Deal brought the skills of the lawyer to public service. But, in the subsequent recovery from the Great Depression of the 1930's, a new elite of government-trained lawyers emerged"; they were able to use their acquired expertise easily to switch from the public domain to the private world, abandoning their "ideal of committed service in the public interest."

The legal profession successfully adopted a series "of compromises to reconcile public responsibility with professional self-interest." In the 1960's, however, they faced the possible disintegration of legal authority because of the civil rights struggle. At that time, many young laywers took an interest in a new type of practice. "The notion that process could be divorced from substance" was challenged as a fiction "proclaimed by the philosophers of legalism." Aggrieved citizens protested that "once legal authority ceased to embrace equity and justice it lost a substantial measure of its legitimacy."

With the Watergate scandal, the legal profession "confronted its most serious crisis of public confidence in the rule of law in America . . . with precarious faith in the legitimacy of legal authority. Renewal of that faith depends upon the unlikely prospect that the legal profession [can] become a truly public profession, with a broader and deeper definition of social responsibility than the bar had ever tolerated."

Auerbach calls for public regulation of the legal profession and poses questions he believes must be answered if the practice of law is to become a public profession. "Justice should be defined not only by the process but by the product. . . . Legal services should exist by right to all citizens. Is the result, measured by the interests of clients and the needs of society, fair? Otherwise, equal justice under law will remain subservient to unequal justice under lawyers."

This is a remarkably well-written and documented book that will be hotly discussed by lawyers and laymen alike. O.E.S.

CURRENT DOCUMENTS

The Supreme Court Rulings on Capital Punishment, 1976

In 1972, in the case of Furman *v.* Georgia,[1] *the Supreme Court ruled 5 to 4 that capital punishment as it was then arbitrarily administered in the United States was unconstitutional.*[2] *On July 2, 1976, the Court ruled 7 to 2 that the death penalty, at least for the crime of murder, is not in essence cruel or unusual punishment and is therefore not by its nature an unconstitutional violation of the eighth and fourteenth amendments. In reviewing five state laws providing for capital punishment, the Court ruled that three state statutes were constitutional;*[3] *two were not.*[4] *Excerpts from the 7–2 decision in the case of* Gregg *v.* Georgia *(1976) follow:*

We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution.

The court on a number of occasions has both assumed and asserted the constitutionality of capital punishment. In several cases that assumption provided a necessary foundation for the decision, as the Court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment. But until *Furman* v. *Georgia,* 408 U.S. 238 (1972), the court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution.

Although the issue was presented and addressed in Furman, it was not resolved by the Court. Four Justices would have held that capital punishment is not constitutional per se; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed. We now hold that the punishment of death does not invariably violate the Constitution.

It is clear from the foregoing precedents that the Eighth Amendment has not been regarded as a static concept. As Chief Justice Warren said, in an oft-quoted phrase, "[the] amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.

First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the . . . crime.

Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts.

. . . We may not act as judges as we might as legislators.

Therefore, in assessing a punishment by a democratically elected legislature against the constitutional measure, we presume its validity.

At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every state. Indeed, the first Congress of the United States enacted legislation providing death as the penalty for specified crimes.

For nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid per se.

Four years ago, the petitioners in Furman and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. . . .

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since Furman have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate . . . sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 states have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death.

As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the amendment.

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have

[1] 408 U.S. 238 (1972).

[2] For a discussion of capital punishment in the United States today see pp. 14ff. of this issue.

[3] Georgia, Florida and Texas.

[4] Blanket mandatory rules in North Carolina and Louisiana were declared unconstitutional.

occasioned a great deal of debate. The results simply have been inconclusive.

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Finally, we must consider whether the punishment of death is disporportionate in relation to the crime for which it is imposed. There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.

But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disporportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

We now consider whether Georgia may impose the death penalty on the petitioner in this case.

The basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here.

For the reasons expressed in this opinion, we hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution. Accordingly, the judgment of the Georgia Supreme Court is affirmed. ■

THE NEED FOR GUN CONTROLS

(Continued from page 28)

handgun deaths. At the same time, public education and ongoing research in the relationship between firearms and violence is also important.

The gun mystique fascinates and excites the imagination. Films, novels and dramatic presentations that depict gun violence are enjoyed and readily understood by all members of our society. The role of the handgun in American society has been distorted. A complete reform of the role of the handgun is needed. It is clearly not a weapon of entertainment, and only rarely is it used for sporting purposes. Many Americans insist that a handgun provides comfort and security in a menacing environment where assailants threaten the weak, the helpless, and the lonely. Yet the proliferation of handguns seems to involve a vicious cycle that sees more and more people buying guns to protect themselves from more and more people who have guns.

I am convinced that this national evil of handgun roulette must be interrupted before the two-gun family becomes as common as the two-car family.

In April, 1976, the House of Representatives' Subcommittee on Crime reported a bill to begin to establish controls on the use of handguns. If this measure is enacted, it will establish the foundation for a full system of controls that can stem the unbridled flow of firearms violence.

From other sources, it has also been recommended that handgun production quotas must be imposed upon the nation's firearms producers. Because the American people have repeatedly expressed the demand for an end to firearms violence, I look forward to the enactment of effective and enforceable controls on the use of firearms. ■

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AGAINST COMPREHENSIVE GUN CONTROL

(Continued from page 25)

a person was responsible for his actions. If a person committed a crime, he should pay the price.

In recent years, some sociologists and other social scientists have advanced the view that individuals are not responsible for their actions. On the contrary, individuals are supposedly the products of their environment. The result has been the decline of individual responsibility and a rise in crime.

Nevertheless, attempts to ignore the facts of life have not negated those facts. Human beings are responsible for their actions. A return to this basic view will help to deter and punish criminals. ■

IMPROVING THE CRIMINAL JUSTICE PROCESS

(Continued from page 9)

libertarianism by virtue of their long tenure. Appointed judges with short tenure (category 3) tend to be negative on economic liberalism and negative on civil libertarianism, by virtue of their method of selection and the lack of independence associated with short tenure. The appointed judges with long tenure (category 4) tend to be negative or conservative on economic liberalism, and positive or liberal on civil libertarianism. Thus, each category of judges tends to have a different +−, ++, −−, or −+ combination on the two goal variables of economic and civil liberties liberalism. The differences in voting behavior among the four groups, however, are not large, given the limited role that liberalism plays in judicial decision-making as contrasted with legislative decision-making, and given the fact that the backgrounds and attitudes of elected/appointed judges and of short/long tenure judges are not very different. To the extent that one is concerned with such differences, these relations enable one to choose more meaningfully among types of selection and tenure.[6]

THE CRIMINAL JURY

Although very few criminal cases result in jury trials instead of a bargained settlement, the results of jury trials are important because those results help determine the upper bargaining limit of the defendant and the lower bargaining limit of the prosecutor. A leading issue concerning the jury system in criminal cases is the issue of how many jurors should be required on a jury, and by what fraction they should be allowed to convict. A useful perspective for analyzing those problems is the inventory modeling approach used to arrive at an optimum percentage of defendants to hold in jail prior to trial.

A 12-person jury will make more errors than a 6-person jury with regard to not convicting the guilty, because it is more difficult for the prosecutor to convince 12 people to convict. On the other hand, a 6-person jury will make more errors with regard to convicting the innocent than a 12-person jury, because it is easier for the prosecutor to convince 6 people to convict than it is to convince 12 people. The ideal jury size would be the one that provides the smallest sum of errors of not convicting the guilty (referred to as type 2 errors) and errors of convicting the innocent (referred to as type 1 errors). Since it is generally considered worse, however, to convict an innocent person than not to convict a guilty person, type 1 errors should be multiplied by some weighting figure.

The key problem in this analysis is determining how much greater the probability of conviction is in the event of a 12-person jury rather than a 6-person jury. If each juror voted totally independent of each other juror, then that comparison would be like comparing the probability of obtaining 12 heads on 12 coin flips versus obtaining 6 heads on 6 coin flips, which are very different probabilities. If, however, each juror tends to vote like the average juror since they are all influenced by the same evidence, judicial instructions, and jury deliberation, then the results of a 12-person jury would tend to be the same as a 6-person jury, assuming that the 6 persons are as random as the 12 persons. The voting behavior of jurors tends to indicate that they come much closer to the averaging model than the coin-flipping model. Thus, the number of guilty people not convicted or of innocent people convicted probably changes very little when moving from a 12-person jury to a 6-person jury, although it changes slightly more when moving from a required 12/12 fraction to convict to a required 9/12 fraction.

ALLOCATING SCARCE CRIMINAL JUSTICE RESOURCES

An important problem in improving the criminal justice process is how to allocate the scarce resources of the criminal justice system, including personnel, effort and, especially, budget dollars. There are many allocation issues although a general classification might refer to how much should be allocated to places like Chicago versus New York, or how much should be allocated to activities of police, courts, and corrections. A useful perspective for viewing such allocation problems is to think of an individual who has $100,000 to deposit in two or more banks. If the banks all pay a constant rate of return, like six percent interest for one bank and five percent for the second bank, then our hypothetical depositor should put all his money in the bank that pays the highest rate of return, at least up to the maximum constraint of the $40,000 federal insurance or the maximum constraint of his $100,000 budget.

Likewise, it makes sense to say that we should invest our anti-crime dollars into the places or the activities that give us the highest rate of return, in

(Continued on page 36)

[6] For further detail on evaluative models and data with regard to judicial selection including other goals, see Nagel, *Comparing Elected and Appointed Judges* (Beverly Hills, Calif.: Sage Publications, 1973); and Richard Watson and Rondal Downing, *The Politics of the Bench and the Bar: Judicial Selection under the Missouri Nonpartisan Court Plan* (New York: Wiley, 1969).

[7] For further detail on models of jury decision making, see Nagel and Neef, "Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict," *Washington University Law Quarterly* (1976); and Harry Kalven and Hans Zeisel, *The American Jury* (Boston: Little, Brown, 1966).

THE AIMS OF IMPRISONMENT

(Continued from page 5)

reductions in crime through any sentencing strategy. In the words of the Incarceration Committee's chairman, former United States Senator Charles E. Goodell (R., N.Y.):

> I [wonder whether] changes in the sentencing and correctional system can work a dramatic reduction in crime rates. However enlightened or ingenious our penal methods become, this country probably will long be condemned to suffer the high crime rates now in evidence—given our history of domestic violence and the extent of disparities in wealth and social status. . . . Today we have not only rampant crime but a gruesome system of punishment: harsh, arbitrary, and lacking in coherent rationale. The latter, at least, we can try to change. We can mitigate severities of punishment to levels more consistent with our pretenses of being a civilized society. . . . We can, I am convinced, mitigate the harshness and caprice of the penal system without losing whatever usefulness in crime prevention it now has. If we could accomplish this much, it would be no mean achievement.[34]

■

[34] Von Hirsch, *Doing Justice,* p. xix.

FREE PRESS AND FAIR TRIAL

(Continued from page 22)

mended to its parent body that action on the proposed guidelines be postponed until the United States Supreme Court acts in the Nebraska case.

United State Court of Appeals Judge Harold Medina, who is death on "gag" orders, reflects the divisiveness of the free press—fair trial issue. He instructs journalists to stand squarely on the first amendment, to regard even voluntary guidelines as "a snare and a delusion," to make no compromises and no concessions and to "fight like tigers every inch of the way" against judges sitting as "petty tyrants."[22]

At the same time, Anthony Lewis of *The New York Times* wonders if a court order briefly forbidding what might make a fair trial difficult in a single case really shakes the foundations of our constitutional system? Says Lewis:

> I think the press would be more effective if it made its case less selfrighteously and less hysterically. . . . Courts routinely restrain false advertising and all sorts of things without violating the First Amendment. The real issue is the values involved. . . . The same media now thundering at the Nebraska case withheld, at official request, the news that the CIA had spent millions on a comic-opera scheme to raise a sunken Soviet submarine.[23]

In the *Pentagon Papers* case, Justice Brennan argued that the first amendment could not be suspended on conjecture.

> The entire thrust of the Government's claim [he said] has been that publication of the material sought to be enjoined "could" or "might" or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.[24]

Ironically, Justice Brennan was the lone dissenter in *Murphy* v. *Florida* (fn. 10), and would have overturned that conviction because of prejudicial publicity.

In early 1976, the National News Council sought a way out of this wilderness of dogma by proposing a national press–bar committee to encourage voluntary restraints by the press and to discourage direct restraints by the bench. The committee would keep a record of press and court performance; it would sponsor seminars; and it would seek more evidence.[25]

It is the third function that demands attention. Judgment is now based on supposition. Available evidence on the effects of news coverage on jury verdicts has not been properly evaluated.

It is time to establish a Presidential Commission on Free Press and Fair Trial that would involve thoughtful and expert persons from outside the fields of law and journalism. The two professions have made only halting progress toward alleviating the conflict between the first and the sixth amendments.

The Presidential Commission on Obscenity and Pornography is a model. That commission found the law inconsistent with the facts—facts that the commission brought to light or collected on its own.[26] Although its report was largely ignored by the White

Errata:

We regret two typographical errors in Peter Krosby's article on Finland in our April, 1976, issue. In Table 1, page 174, the 1974 and 1975 figures for EFTA's percentage of Finland's imports should be 26.1 and 25.9, respectively.

We regret two typographical errors in Carol Thompson's article, "Women in the Antislavery Movement," in our May, 1976, issue. On page 199, left paragraph, line 12, the phrase should read "4 million [African slaves in the United States in 1863]." In the right hand paragraph, line 29, the phrase should read "In the early 1830's a 'lady' did not speak in public. . . ."

We regret an error in James E. Rooks, Jr.,'s article in our June issue. Footnote 31 on page 276 should read "Justice Byron White. . . ."

[22] Harold R. Medina, in a letter to *The New York Times,* reprinted in the *Minneapolis Tribune,* December 4, 1975, as "The First Amendment on the Line." Judge Medina is associated with the conciliatory *Medina Report* (Freedom of the Press and Fair Trial: Final Report with Recommendations by the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York), Columbia University, 1967.

[23] "What Should Not Worry the Press," *Minneapolis Tribune,* December 12, 1975.

[24] *Op. cit.,* pp. 725–726.

[25] The National News Council, "Free Press and Fair Trial, A Proposal," at its meeting, January 19–20, 1976.

[26] *Report of the Presidential Commission on Obscenity and Pornography* (New York: Bantam Books, 1970).

House and the United States Supreme Court, it is likely its findings will eventually provide the base for a rational social policy on this issue.

A Free Press–Fair Trial Commission would have to determine on the basis of field experiments how seriously the right to a fair trial before an impartial jury is jeopardized by specific kinds of news coverage. It would address such legal questions as to what extent a right of privacy justifies secrecy in the criminal process; and such journalistic questions as whether the press violates its social responsibility when it complies for even a single day with a judge's request not to refer to murder charges pending against a man being tried for perjury.[27]

There are even more difficult questions. Can fairness be predicated on ignorance? If we cannot trust jurors to be fair, can we coerce, cajole or deceive them into reaching fair verdicts? When we examine the history of the sixth amendment is it not true that a trial by one's peers would include persons who know the defendant, have impressions about his character, and have heard the rumors and gossip? Are such jurors to be preferred over those whose impartiality and inflexibility may be based on ignorance and disinterest? Should the press be presumed in advance unfit to perform its constitutionally guaranteed right and duty to inform citizens of the working of their governments?

If there is no solution to the conflict between a free press and a fair trial, we ought to know that, too. ■

[27] See *United States* v. *Schiavo,* 504 F. 2d (3d Cir. 1974).

THE PROBLEM OF CAPITAL PUNISHMENT

(Continued from page 18)

punishment has appeared only in forms in which an attempt is made to punish some dangerous offenders for some kinds of dangerous crimes. From all indications, this appears to be what most Americans profess to want when they are asked by various pollsters or survey researchers what attitudes they have toward capital punishment.[18] However, the blunt truth about this alternative is that it also appears to be unconstitutional.

Why the Court held in *Furman* that this alternative is unconstitutional is easy to understand, once one examines the facts about the death penalty and appraises these facts in light of the basic notions of justice and fairness appropriate to the constitution. This alternative gives us flexibility to disagree over which offenders are the worst and which offenses are the gravest. But as a result, prosecutors, juries and governors are demonstrably inconsistent in the justice they mete out when the death penalty is involved.[19] When one looks at the several thousand persons executed so far in this century, one sees an overwhelming majority who are poor, defenseless, socially inconsequential, or hated and outcast. Earlier in this century, they were typically immigrants or first generation hyphenated Americans; in more recent decades they have become increasingly non-white.[20] Yet only a tiny fraction of the more than a million murders, rapes, kidnappings and other violent crimes against persons in this century have been punished by death. No criminologist or penologist seriously believes that all and only the worst crimes and the most dangerous offenders have been punished by this most severe penalty. On moral grounds, it is difficult to see how one could defend the record of arbitrary and unpredictable (and insofar as not unpredictable, discriminatory) use of capital punishment in our society.

It is true that the *Furman* decision did not entirely rule out capital punishment; it is also true that the discretionary alternative allows an indefinite number of variations, although we thus far have explored only a small number of them. During the four years since *Furman,* there is certainly no reason to believe that in the future we shall improve on the record of arbitrariness we have so far made in this century. The most recent research shows that since 1972 "blacks and other nonwhites are now more likely to receive the death penalty than before."[21]

What can be said for entirely abolishing the death penalty? First, abolition is advantageous from the standpoint of the taxpayer. While it may be cheap to hang, electrocute, or gas a convict, it is extremely expensive to support the "death row" system of special custody in prison and the time-consuming ordeal of trial and appellate litigation where the death penalty is involved.[22] Second, doing away with capital punishment is also doing away with the possibility of extreme abuses and extreme injustices

[18] See Neil Vidmar and Phoebe Ellsworth, "Public Opinion and the Death Penalty," *Stanford Law Review,* vol. 26 (June, 1974), pp. 1245–1270; and Austin Sarat and Neil Vidmar, "Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis," *Wisconsin Law Review,* 1976 forthcoming. Both essays are reprinted in Bedau and Pierce, eds., *op. cit.*

[19] See Charles E. Black, Jr., *Capital Punishment: The Inevitability of Caprice and Mistake* (New York: W. W. Norton, 1975).

[20] See, for a list of over 5,000 persons executed during the past century in the United States, William J. Bowers, *Executions in America* (Lexington, Mass.: D. C. Heath, 1974), Appendix A, pp. 200–401.

[21] "More Bias is Found in Death Penalty," *The New York Times,* April 4, 1976, sec. 1, page 42; a summary of the findings in Marc Riedel, "Death Row: 1975: A Study of Offenders Sentenced Under Post-Furman Statutes," *Temple Law Quarterly,* vol. 49 (1976), pp. 261ff. This article is reprinted in Bedau and Pierce, eds., *op. cit.*

[22] See The Washington Research Project, *The Case Against Capital Punishment* (Washington, D.C.: 1971), pp. 61–62.

Traditionally, the most impressive argument against the death penalty has been the risk of executing a wholly innocent person.[23] Today, the strongest argument for the abolition of the death penalty is the apparent impossibility of administering this extreme punishment equitably, uniformly and fairly.[24] The moral cost that society pays for the risks and inequities embodied in the death penalty is hardly compensated for by gains in marginal retribution or marginal deterrence.

Third, the death penalty does not appear to be a superior deterrent to murder, rape, assault, or kidnapping. In recent years, the nation has seen the rate of serious crimes against the person show a marked increase,[25] and some have been quick to explain this by the failure to employ capital punishment. Some recent investigators have even alleged that the death penalty has been shown to be an effective deterrent, and these allegations have received much publicity.[26] All one can say at the present time is that the issue of crime prevention and deterrence is under vigorous investigation and it is not possible to pronounce with absolute certainty either way. It may be true, as mother wit tells us, that the Greater the Severity of Punishment the Less Frequent the Crime, but the evidence from social science seems not to confirm this, at least in this country when the death penalty is used.[27]

A century ago, Frederich Nietzsche remarked, "Beware all those in whom the desire to punish is strong." We might amend this to read: "Beware all those in whom the desire to punish by death remains strong in the face of the evidence." The controversy over capital punishment rises out of our understandable fear of violent crime and our desire for an efficient and effective system of law enforcement and punishment under law.

However we punish the most dangerous offenders who have committed the gravest crimes, the policy is not likely to be one of the glories of our civilization. Nevertheless, we have the responsibility to make that policy as fair and as effective as possible. ■

[23] See "Murder, Errors of Justice, and Capital Punishment," in Bedau, ed., *op. cit.* at pp. 434–452; and Donald E. J. MacNamara, "Convicting the Innocent," *Crime and Delinquency,* vol. 15 (January, 1969), pp. 57–61.

[24] See Black, *op. cit.*

[25] "Since 1961 the rate for all serious crimes has more than doubled. . . . Violent crime has had an even sharper increase. In the past 14 years, the rate of robberies has increased 255%, forcible rape 143%, aggravated assault 153% and murder 106%." "The Crime Wave," *Time,* June 30, 1975, p. 10. For national police statistics, see *Uniform Crime Reports,* "Crime in the U.S.," annual publication of the Department of Justice, Washington, D.C.

[26] See Gordon Tullock, "Does Punishment Deter Crime?" *The Public Interest,* no. 36 (Summer, 1974), pp. 103–111; and Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," *American Economic Review,* vol. 65 (June, 1975), pp. 397–417.

[27] See the special section, "Statistical Evidence on the Deterrent Effect of Capital Punishment," *The Yale Law Journal,* vol. 85 (December, 1975), pp. 164–227; Peter Passell, "The Deterrent Effect of the Death Penalty: A Statistical Test," *Stanford Law Review,* vol. 28 (November, 1975), pp. 61–80; Lee S. Friedman, "The Use of Multiple Regression Analysis to Test for a Deterrent Effect of Capital Punishment: Prospects and Problems," Working Paper #38, Graduate School of Public Policy, University of California, Berkeley, October, 1975. For a general discussion of deterrence, see Jack P. Gibbs, *Crime, Punishment, and Deterrence* (New York: Elsevier, 1975).

THE ACCUSED VERSUS SOCIETY

(Continued from page 13)

sometimes held to obtain "exculpatory" information that prosecutors may have in their files.

The defendant has a right to challenge the entire "array" of jurors, as well as specific jurors, to ensure that no group has been improperly and systematically excluded from jury lists and that each juror will be fair. In all but a few states, the defendant also has the right not to be convicted unless 12 jurors unanimously agree upon a guilty verdict. If only one disagrees, a mistrial is declared and the case may have to be retried.

Most of the rights we speak of in the criminal area are subdivisions of a basic right contained in both the fifth and the fourteenth amendments that declares that "No person shall be . . . deprived of life, liberty, or property, without due process of law." This "due process" clause, as it is referred to, also ensures against double jeopardy (multiple prosecution for the same offense); through the eighth amendment it also prohibits the infliction of cruel and unusual punishment. The "due process" clause provides a brake on law enforcement excesses. Police, for example, are not permitted to "entrap" a person by tricking or pressuring that person into committing a crime. There are also limits on the use of informants to gather evidence. The "due process" clause relates to all the procedures of criminal justice administration from arrest through prosecution, trial and appeal, as distinguished from the substantive nature of the laws themselves.

On appeal, however, the defendant may protect still other rights by challenging the substance of the law under which the defendant has been convicted: Is a disorderly conduct statute too broadly prohibitive of otherwise legal behavior? Has the right to free speech been impaired by an obscenity law? Does an abortion law invade the right to privacy? Does a gun registration law violate the right to bear arms? Does a personal registration law violate the right to travel freely? Does a law forbidding membership in a criminal organization violate the rights of free association and assembly? Does a law prohibiting the sale of goods on Sunday violate the right to the free exercise of one's religion?

All the rights referred to above are, to some degree, protected by the United States constitution. Nevertheless, legislatures and law enforcement officials have felt there to be a need for limiting laws. The courts will decide each of these cases by the familiar balancing test that Justice Cardozo wrote about. It is rare for courts to decide cases in which one side is unquestionably right and the other unquestionably wrong. Usually, there are legitimate arguments on both sides and different "rights" compete.

As an example, imagine an instance in which a gory murder has been committed and a woman accused of it is on trial. That woman is entitled to what we refer to as the "presumption of innocence," that is, the right not to be judged guilty until after a conviction, either by plea or by a jury. If the press prints pictures of the crime, and the local television newscaster refers to her as "the killer," can she receive the fair and impartial trial to which she has a right? On the other hand, the public has a right to know and the press has a right to publish news, and the newscaster has the right to free speech. How is a court to handle the dilemma created by this conflict of rights? Usually, a court declares that none of these rights is absolute and that no one of them is always more important than any other. Instead, the court will examine the facts carefully to try to strike a balance between these competing rights and to establish the appropriate limits.

The dilemma we address is not easy to resolve and reasonable minds are bound to disagree on the specific balance. Today, we are apparently moving toward a greater awareness of and appreciation for the rights of the victims of crime (including some reform proposals like the one to provide monetary compensation to crime victims now being considered by Congress in the proposed Senate Bill #1, the Criminal Justice Reform Act of 1976). Yet our previous overconcern with the rights of criminal defendants must not lead us too far in the other direction; we must always remember that the person accused of a crime is an individual entitled to the fair and equal protection of the laws no less than is the victim, but no more. ■

IMPROVING THE CRIMINAL JUSTICE PROCESS

(Continued from page 32)

terms of increased compliance with the law or whatever goal we are seeking. Just as our depositor may not be able to put an unlimited amount in any one bank, we may also have to think in terms of a minimum and a maximum amount for each place or activity, determined by political, legal, or economic constraints. One big difference between the banking allocation and the criminal justice allocation is that it is easier to obtain data on the relative rates of return of banks than on places or anti-crime activities. One can, however, obtain data showing (1) changes in expenditures for various places over time and (2) changes in their crime rates, statistically controlling for socioeconomic characteristics. One can also obtain data from different places at one time in order to relate (1) differences in expenditures for various activities to (2) differences in crime rates or other measures, statistically controlling for socioeconomic characteristics. Even without the data, thinking in terms of relative rates of return can be helpful.

An alternative allocation problem would take into consideration the fact that some banks pay a changing rate of return, whereby they might give six percent interest on the first $10,000, seven percent on the next $30,000, and eight percent on money deposited above $40,000. That would be an example of an increasing rate of return. A common situation in many investments (although not bank savings accounts) is to have a decreasing or diminishing rate of return whereby the investment pays six percent for the first $10,000, five percent for the next $50,000, and four percent thereafter. If our hypothetical depositor was faced with a bank like that and one that pays a constant five percent, then he would not put all his money in one bank as he would when all the banks paid a constant rate of return. Instead, he would put his first $10,000 into the bank that pays six percent on the first $10,000, and then he could divide the remainder of his $90,000 between the two banks and receive five percent interest from each of them on two $45,000 deposits, assuming the interest rate is his only choice criterion.

Likewise, in allocating criminal justice resources, we usually face the occurrence of diminishing returns; putting additional funds into a given place or activity may increase legal compliance through that place or activity, but at a diminishing rate of return. Under such circumstances, it would make sense to try to allocate our scarce resources so that we are receiving about the same rate of return from each place or activity, so that there would be nothing to be gained from shifting our effort from one place to another or from one activity to another.[8]

This perspective, like the other perspectives we have presented, is useful in a wide variety of situations to obtain insights with regard to improving the criminal justice process. Perspectives like these are increasingly used to make more rational and productive the discussion and debates that deal with improving the American criminal justice system. ■

[8] For further detail on allocating scarce resources in the criminal justice system, see Donald Shoup and Stephen Mehay, *Program Budgeting for Urban Police Services* (New York: Praeger, 1972), and Nagel and Neef, "Allocating Resources Geographically for Optimum Results," *Political Methodology* (1976).

TWO MONTHS IN REVIEW

A CURRENT HISTORY chronology covering the most important events of May and June, 1976, to provide a day-by-day summary of world affairs.

INTERNATIONAL

Arab League

(See *EEC, Middle East*)

Arms Control

May 28—In simultaneous action in Washington, D.C., and Moscow, U.S. President Gerald Ford and Soviet Communist Party Secretary Leonid I. Brezhnev sign a treaty prohibiting underground nuclear explosions for peaceful purposes above the 150-kiloton level and, for the first time, providing for on-site inspection of nuclear tests under some circumstances. The agreement complements the never-ratified 1974 treaty limiting underground nuclear weapons tests, which also set a 150-kiloton ceiling for a single explosion. President Ford is expected to submit both treaties to Congress for ratification simultaneously.

June 2—Representatives of the U.S. and the Soviet Union resume discussions in Geneva in an attempt to reach further agreement expanding their 1972 accords curbing strategic nuclear weapons.

European Communist Meeting

(See also *Yugoslavia*)

June 30—At the close of a 29-nation, 2-day conference of East and West European Communist party leaders in East Berlin, a communiqué stresses "the principles of equality and sovereign independence of each party."

European Economic Community (Common Market)

May 18—An EEC spokesman in Brussels reports that EEC members have rejected U.S. President Gerald Ford's demand to negotiate an agreement limiting the export of EEC specialty steel products to the U.S.

May 20—A 3-day meeting of European Common Market representatives and members of the 20-nation Arab League ends; the Arab League demands the political support of the EEC in exchange for economic cooperation.

May 26—9 Common Market nations agree in principle to a common fund to control third world commodity prices; West Germany and Great Britain do not acquiesce. The EEC attitudes are reported to the commission of the 24 industrial nations at the U.N. Conference on Trade and Development.

Inter-American Development Bank

May 18—At a meeting of the 34 members in Cancun, Mexico, Antonio Ortiz Mena, president of the Inter-American Development Bank, calls for more U.S. financial aid for the bank's lending programs.

International Bank for Reconstruction and Development (World Bank)

May 28—Ernest Stern, a vice president of the World Bank, reveals that 13 nations have agreed to continue aid to India at the current level for another year.

International Terrorism

May 21—6 men believed to be rebel Muslims hijack a Philippine Air Lines domestic jetliner with its crew of 6 and 97 passengers.

May 23—In an exchange of gunfire between hijackers and attacking Philippine Army troops in Zamboanga, 3 hijackers and 10 hostages are killed; 22 other hostages are wounded; 3 hijackers are captured; and the plane is destroyed by grenades exploded by the hijackers.

June 28—An Air France jetliner hijacked yesterday from Athens lands in Uganda; 256 passengers and crew members are held as hostages by Palestinian extremists.

June 29—In Uganda, the hijackers demand the release of 53 Palestinians and pro-Palestinians held in 5 countries as a condition for the release of their hostages.

June 30—Hijackers free 47 hostages; some 210 are still held.

Middle East

(See also *U.N.*)

May 3—Despite the resumption of the Lebanese cease-fire, heavy fighting continues around the port area in Beirut.

May 5—Egyptian officials and Palestine Liberation Organization representatives reportedly reach an understanding for mutual cooperation in Lebanon.

May 11—The Lebanese leftist Muslim alliance, headed by Kamal Jumblat, offers to cooperate with Lebanon's President-elect Elias Sarkis if Syria is prevented from intervening in Lebanese affairs and if the Palestine resistance movement is protected.

May 13—Beirut radio reports that nearly 300 people have been killed or wounded during the last 24 hours in Lebanon in the heaviest fighting of the last 13 months.

May 14—For the first time, the Command of the Palestinian Revolution charges that "Syrian forces" have been directly involved in the fighting in Lebanon.

May 17—Libyan Prime Minister Major Abdul Salam Jalloud and Palestine Liberation leader Yasir Arafat leave Damascus for Beirut after conferring with Syrian President Hafez al-Assad.

May 20—Jalloud leaves Beirut and returns to Damascus for additional talks with Syrian President Assad. He says that Libya firmly supports the Lebanese leftist Muslim alliance.

May 22—In New Orleans, French President Valéry Giscard d'Estaing says that his country is willing to send "several regiments" of peace-keeping forces to Lebanon on 48 hours notice.

May 24—In Beirut, President-elect Sarkis meets with French Ambassador Hubert Argot to clarify French President Giscard's offer to send French troops to Lebanon.

Fighting intensifies around Beirut.

May 31—Heavy fighting continues in Beirut; nearly 115 were killed and 230 wounded in the fighting May 29 and May 30.

June 1—Radio Damascus reports that on May 31 Syrian "delegates" crossed into Lebanon at the request of local

Lebanese citizens. The Syrians reportedly arranged for talks between the two warring sides.

Reports indicate that nearly 5,000 Syrian troops and tanks entered Lebanon along the Beirut-Damascus highway yesterday and today.

June 2—In Beirut, the leftist Muslim alliance stages a general strike to protest the intervention of Syrian troops.

June 6—In Beirut, the right-wing Christian faction approves Syria's military intervention.

June 8—Representatives of all 20 Arab League countries begin an emergency meeting in Cairo, called at the request of the Palestine Liberation Organization (PLO) to discuss the deployment and use of Syrian troops in Lebanon.

An additional 7,000 Syrian troops have reportedly entered Lebanon; the total number of Syrian troops there reaches nearly 12,000. Reports indicate that Syrian armored divisions are within 18 miles of Beirut.

June 9—At the urging of Arab League delegates, Syrian President Assad agrees to the stationing of Arab League troops in Lebanon as a token "peace-keeping force."

June 13—In Damascus, Syrian Information Minister Ahmad Iskander says that his government has no intention of withdrawing troops from Lebanon until the government of President-elect Sarkis is able to fuction and until there is an effective cease-fire.

June 16—In Beirut, U.S. Ambassador Francis E. Meloy, Jr., and his economic adviser, Robert O. Waring, are shot to death on their way to a meeting with President-elect Sarkis.

June 17—The Palestinian Press Service announces the arrest of 3 Lebanese who have reportedly confessed to the murders of Meloy and Waring.

June 20—The U.S. Navy completes the evacuation of 263 American and foreign nationals from Beirut—an estimated one-tenth of all U.S. citizens in Lebanon. Palestinian guerrillas and Lebanese leftists have provided protection for the naval operation, which is taking the evacuees to Greece.

June 21—In Riyadh, Egyptian President Anwar Sadat, Saudi Arabian King Khalid and Palestine Liberation Organization leader Yasir Arafat meet to discuss the Lebanese crisis.

The first contingent of the Arab League peace-keeping force arrives in Beirut. The 1,000-man force will oversee the reopening of the Beirut airport, which has been closed for more than 2 weeks.

June 24—The Beirut airport reopens.

June 25—For the 3d day, Christian militiamen continue their attack on 2 Palestinian refugee camps in the southwestern section of Beirut.

June 27—Beirut airport is closed when a Boeing 707 passenger jetliner is shelled and destroyed. The pilot is killed by the blast. The right-wing Christian Phalangists are thought to be responsible for the destruction.

June 28—Syria sends 4,000 additional soldiers to Lebanon; the total number of Syrian troops is estimated at 16,500.

June 29—In Beirut, Libyan Prime Minister Jalloud is unsuccessful in his 10-day attempt to find a political solution to the Lebanese crisis. He returns to Libya by way of Damascus to "escalate" Libyan support for the Palestinians and Lebanese leftists and Muslims.

June 30—After 8 days of heavy fighting, right-wing Christian militiamen take over Jisr el-Pasha, a Palestinian refugee camp outside Beirut.

Delegates to the Arab League meet in Cairo to discuss recent events in Lebanon.

North Atlantic Treaty Organization (NATO)

(See also *U.S., Foreign Policy*)

May 20—Addressing a closed meeting of NATO foreign ministers in Oslo, U.S. Secretary of State Henry Kissinger declares that the U.S. will continue to support the defense of the West against Soviet aggression no matter which U.S. presidential candidate wins the 1976 U.S. election.

May 21—At the close of a 2-day meeting in Oslo, NATO foreign ministers call for a continuation of efforts to relax "tensions" in Soviet relations.

Organization for Economic Cooperation and Development (OECD)

May 26—24 member nations establish guidelines for the behavior of multinational corporations, following revelations about the illegal practices of some multinationals.

June 21—In Paris to address the opening session of the annual OECD ministers' meeting, U.S. Secretary of State Henry Kissinger urges the ministers of the 24 nations to cooperate more closely both politically and economically in order to deal with Communist and third-world countries.

June 22—To control inflation, OECD ministers propose a 5 percent annual growth rate as a goal for industrial nations.

Organization of American States (OAS)

June 19—In Santiago, Chile, the 6th general assembly of the OAS ends 10 days of ministerial level conferences.

Organization of Petroleum Exporting Countries (OPEC)

May 11—Meeting in Paris, OPEC finance ministers agree to commit $400 million to an international fund (the International Fund for Agricultural Development) to aid in increasing food in developing countries.

May 28—Meeting in Indonesia, OPEC representatives vote to extend the freeze on petroleum prices "for the present"; the decision reportedly reflects the dominance of Saudi Arabia.

Seven-Nation Economic Conference

(See *U.S., Foreign Policy*)

United Nations

(See also *EEC; U.S., Foreign Policy*)

May 5—The United Nations Conference on Trade and Development opens a conference in Nairobi; 150 countries are represented.

May 7—After 8 weeks of negotiations by representatives of 147 countries in New York, the United Nations Law of the Sea Conference adjourns with differences still unresolved; representatives agree to a 7-week conference in New York starting August 2 to try to complete their work, which was begun in 1973.

May 24—The United Nations Education, Scientific and Cultural Organization's (UNESCO) Executive Board votes almost unanimously to ask Israel to guarantee educational and cultural rights in Israel's occupied territories. Only the U.S. opposes the resolution.

May 26—With the U.S. refraining, the Security Council censures Israel's establishment of new settlements in

occupied Arab territory. The censure comes after a 3-week debate on the Middle East.

May 27—In Syria, Secretary General Kurt Waldheim announces that Syria has agreed to a 6-month extension of the U.N. observer force on the Golan Heights.

May 28—The Security Council votes 13 to 0 to extend the U.N. observer force in the Golan Heights for 6 months.

May 30—The Conference on Trade and Development reaches a compromise agreement on the regulation of world commodity markets; a conference is to be called to discuss the establishment of a common fund to regulate prices of key commodities.

June 4—In Geneva, the International Labor Organization (ILO) conference votes to admit the Palestine Liberation Organization as an observer by a 31-to-23 vote, with 1 abstention. The U.S. opposes the resolution.

June 8—U.S. and Israeli delegations walk out of the ILO conference in protest when a PLO observer, Abdul-Muhsim Mizer, addresses the conference.

June 11—The U.N. Conference on Human Settlement ends 2 weeks of meetings in Vancouver, British Columbia; the 4,500 delegates have approved more than 100 recommendations to improve worldwide community life.

June 16—After a Security Council vote of 13–0 to renew the mandate of the U.N. peace-keeping force in Cyprus, Secretary General Kurt Waldheim acts to arrange an early resumption of talks between Greek and Turkish representatives of their respective communities in Cyprus.

June 19—South Africa's Ambassador to the U.S. Roelof Botha tells the Security Council that his country will not permit any international body to dictate how South Africa deals with her internal racial problems.

June 23—Voting in the Security Council, the U.S. vetoes the application of Angola for U.N. membership because of the continued presence of Cuban troops in Angola; China abstains from voting and the other 13 countries in the Council vote in favor of Angola's admission.

June 29—In the Security Council, the U.S. vetoes a Middle East resolution calling for Israeli withdrawal from all occupied territories.

ANGOLA

(See also *Intl, U.N.; U.S.S.R.*)

May 19—Prime Minister Lopo do Nascimento orders all Portuguese diplomats to leave the country; he stresses the government's foreign policy of nonalignment and emphasizes the country's special relationship with Cuba.

May 21—An unauthorized report is published describing the newly assigned powers of the Central Committee of the ruling Popular Movement for the Liberation of Angola over the armed forces.

May 23—Prime Minister Nascimento flies to Moscow. His visit is described as an expression of the Angolans' gratitude for Soviet assistance in the recent war for independence.

May 25—U.S. Secretary of State Henry Kissinger reports that Cuban President Fidel Castro has written a letter to the Swedish Prime Minister saying that Cuba would begin withdrawing her troops in increments of 200 a week. By the end of 1976, Cuban troop strength should be reduced by half.

June 11—The trial begins for 13 English and American soldiers charged with acting as mercenaries against the People's Republic of Angola.

June 28—The People's Revolutionary Tribunal sentences one American and 3 British mercenary soldiers to death by firing squad for their role in the recent civil war. In addition, 2 American and 7 British mercenary soldiers are given prison sentences of between 16 and 30 years.

ARGENTINA

(See also *Bolivia*)

June 5—Former President Isabel Martínez de Perón is officially charged with misusing public funds for private gain. If convicted, she can be sentenced to up to 10 years in prison.

June 9—In Buenos Aires, a list of names and addresses of some 8 thousand political refugees living in Argentina is stolen from the Catholic International Migrations Committee.

June 11—25 political refugees are abducted at gunpoint from 2 hotels in Buenos Aires.

June 12—U.N. officials report that all 25 abducted political refugees have been released.

June 18—In Buenos Aires, federal police chief General Cesareo Cardozo is killed when a bomb explodes in his bedroom. More than 320 people have been murdered since March 24, when the army ousted President Perón.

June 23—The military government deprives former President Perón and 35 other Peronist leaders of their civil rights. They can be arrested and held for an indefinite time without trial.

BOLIVIA

(See also *France*)

June 3—In Buenos Aires, Argentina, former President Juan José Torres is found murdered on a country road. He had been in exile since 1971.

June 9—The government declares a country-wide state of siege because of the week-long strikes and student demonstrations.

BRAZIL

June 27—It is announced that Parliament has passed a bill limiting radio and television advertising in the campaign for municipal elections in November, 1976.

CAMBODIA

(See *Thailand*)

CANADA

May 18—Foreign Secretary Allan MacEachen announces the termination of the nuclear cooperation pact with India.

June 4—Foreign Secretary MacEachen announces that effective January 1, 1977, Canada will adopt a 200-mile offshore fishing limit.

June 11—The National Energy Board announces a 12 percent decrease in the amount of oil sold to the U.S., effective July 1. Yesterday, Energy Minister Alastair Gillespie announced a 21-percent increase in the price of natural gas exported to the U.S.

June 20—Airline pilots begin a national strike to protest the increasing use of the French language in air traffic control operations.

June 28—The government announces that the 9-day strike by air traffic controllers and airline pilots has ended.

CHILE

(See *U.S., Foreign Policy*)

CHINA

(See also *Pakistan*)

May 1—Radical and moderate government leaders make an unusual appearance together on national television.

May 6—In Peking, British Foreign Secretary Anthony Crosland meets with Prime Minister Hua Kuo-feng and Foreign Minister Chiao Kuan-hua.

June 8—*The New York Times* reports that the Chinese government has opened a new oil terminal in the Manchurian port of Darien. The new port can handle oil tankers up to 100,000 tons.

June 15—The Communist party's Central Committee has decided not to allow foreign visitors to meet with the ailing Chairman Mao Tse-tung.

CUBA

(See also *Intl, U.N.; Angola*)

May 6—Defense Minister Raul Castro meets in Moscow with Soviet Party Secretary Leonid I. Brezhnev.

May 20—In Tokyo, Deputy Prime Minister Carlos Rafael Rodríguez says that it is "inconceivable" that Cuban troops will fight in southern Africa as they did in Angola.

CYPRUS

(See also *Intl, U.N.*)

June 21—Rauf Denktash, the Turkish Cypriote leader, is reelected as President of the "Turkish Federated State of Cyprus."

EGYPT

(See also *Intl, Middle East*)

June 5—In retaliation for a Syrian attack on its Damascus embassy, the Egyptian government orders its Syrian embassy closed and all diplomatic personnel returned to Egypt.

June 23—In Riyadh, Egyptian and Syrian officials meet to discuss ways of ending the year-long dispute between the two countries.

EL SALVADOR

May 17—In New York City, Colonel Manuel Alfonso Rodriguez, chief of the armed forces, is arrested by New York City police; he is charged with conspiring to sell 10,000 machineguns.

ETHIOPIA

May 3—Eritrean rebels release 2 American civilians who were kidnapped July 14, 1975, and an Englishman who was kidnapped in October.

May 16—Over national radio Brigadier General Tafari Banti offers amnesty to most Eritrean political prisoners and financial assistance to the province, in an attempt to avert a major clash.

May 18—The pro-government march by armed peasants into the province of Eritrea is blocked when a bridge in Tigre Province is blown up. Nearly 50,000 men were reportedly mobilized by the government for the march.

FINLAND

May 13—Prime Minister Martti Miettunen submits his resignation to President Urho Kekkonen. His 5-party coalition government, including Communists, is unable to agree on a sales tax increase.

May 18—President Kekkonen persuades the coalition government to withdraw its resignation.

FRANCE

(See also *Intl, Middle East; South Africa; Syria; U.S., Foreign Policy*)

May 10—In Paris, President Valéry Giscard d'Estaing addresses the opening session of a 2-day conference of leaders of 19 African and Indian Ocean countries.

May 11—In Paris, Bolivian Ambassador Joaquin Zenteno Anaya is shot and killed by an assailant who is later identified as a member of the "International Che Guevara Brigade."

May 14—In Paris, the president of the Crédit Lyonnais, the country's 2d largest bank, is shot to death.

June 23—In a 256-to-197 vote, the National Assembly approves legislation calling for a capital gains tax.

GERMANY, DEMOCRATIC REPUBLIC OF (East)

May 19—In East Berlin, Soviet delegate Mikhail A. Suslov addresses the 9th party congress of the East German Communist party.

GERMANY, FEDERAL REPUBLIC OF (West)

May 9—Ulrike Meinhof, a leader of the Baader-Meinhof urban guerrilla group, is found hanged in her jail cell.

ICELAND

May 21—In Oslo, Prime Minister Geir Hallgrimsson and British Foreign Secretary Anthony Crosland meet to discuss the disputed fishing grounds.

June 1—Foreign Minister Einar Augustsson and British Foreign Secretary Crosland sign a temporary agreement ending the 7-month dispute over fishing rights off Iceland. Under the agreement, the number of British trawlers will be limited in Iceland's 200-mile fishing zone.

June 3—Diplomatic relations between Iceland and Great Britain are restored.

INDIA

(See also *Intl, IBRD; Canada*)

May 3—The government agrees to purchase $83-million worth of grain from the U.S.

May 12—In Islamabad, Pakistan, talks between India and Pakistan on normalizing relations resume after a 12-month break.

May 14—Foreign Secretary Jagat S. Mehta and Pakistani Foreign Secretary Agha Shahi announce the decision of the 2 countries to restore diplomatic relations "within a short period of time."

May 15—Asoke Mehta, a former Cabinet minister and an opposition leader, is released from jail; he had been held as a political prisoner since June, 1975.

May 26—In New Delhi, opposition leader Jaya Prakash Narayan announces plans to form a coalition party, consisting of 4 opposition groups.

June 10—Socialist party chairman and opposition leader George Fernandes is arrested in Calcutta. He has eluded the police since the state of emergency went into effect in June, 1975.

June 11—Prime Minister Indira Gandhi leaves Moscow after a 4-day visit with Soviet officials.

June 16—The government extends for 1 year its right to hold prisoners for 2 years before telling them of the charges against them and before they have the right to petition for release.

INDONESIA

June 5—On reaching the mandatory retirement age, President Suharto retires as a general of the army; however, he retains his position as supreme commander of the armed forces.

Timor

May 31—In Dili, the People's Assembly votes to become the 27th province of Indonesia; half the island formerly belonged to Portugal.

IRAN

May 15—The National Assembly approves a treaty of friendship with Iraq.

May 16—In Teheran, in several incidents between security forces and terrorists, 3 policemen and 11 terrorists are killed.

May 22—The U.S. State Department announces that Iran will provide Morocco with $10-million worth of aircraft and artillery indirectly; the equipment will be transferred through Jordan.

The government newspaper accuses the Libyan government of paying huge sums of money to Iranians to act as terrorists against the Shah's government.

May 28—The International Commission of Jurists accuses Iran's National Information and Security Organization of using "psychological and physical torture" on its suspects. Shah Mohammed Riza Pahlevi has "personal control" over the secret police.

June 21—The government agrees to purchase Occidental Petroleum Corporation stock worth $125 million. This will be the largest Iranian investment ever made in a U.S. concern.

June 29—At the Teheran airport, police kill 10 terrorists in a gun fight. 60 alleged terrorists have been killed or executed this year.

IRAQ

(See *Iran; U.S.S.R.*)

ISRAEL

(See also *Intl, U.N.*)

May 7—Parliament's finance committee approves the partnership of an American oil drilling company and the government in the development of an oilfield in the occupied Sinai.

May 9—The government decides that settlers in the army base in the West Bank area must move. No new location has been determined. The Cabinet, however, calls for additional settlements in the West Bank area at the government's discretion.

May 18—For the 3d time in 3 days, Israeli soldiers shoot and kill an Arab youth in the occupied West Bank area.

June 15—In a foreign policy speech before Parliament, Prime Minister Yitzhak Rabin warns that if the Syrians or Palestinians take control in Lebanon the Middle East peace will be threatened.

June 20—Despite the opposition of Defense Minister Shimon Peres, the government reduces its defense budget by 1.6 percent.

ITALY

May 1—President Giovanni Leone dissolves Parliament.

May 7—An earthquake devastates a northeastern section of the country; nearly 40,000 people are left homeless.

June 20—Parliamentary elections begin; the elections—the most important since 1948—will last 2 days. 630 seats in the Chamber of Deputies, 315 seats in the Senate, and local council positions in 130 cities are contested.

June 22—Final election returns for the 630-member Chamber of Deputies give the Communists 228 seats, an increase of 49; the Christian Democrats win 263 seats, a loss of 3. In the 315-seat Senate, the Communists win 116 seats, an increase of 23; the Christian Democrats win 135 seats.

June 23—Communist party officials say they are willing to forgo their demands for Cabinet positions in exchange for more responsibility in formulating government policy.

JAMAICA

May 12—In Kingston, the government orders a dawn-to-dusk curfew to curb the rising violence. 12 people have been killed in the last 6 days.

June 19—Prime Minister Michael N. Manley declares an indefinite state of emergency to control the increasing wave of violence; more than 70 people have been killed this year.

JAPAN

May 10—In Tokyo, the public prosecutor formally charges Yoshio Kodama with illegally receiving $1.5 million from the U.S. Lockheed Aircraft Corporation.

May 24—The upper house of Parliament completes ratification of the 1968 international treaty on the limitation of nuclear weapons.

JORDAN

(See *U.S.S.R.*)

KENYA

June 16—The government reaches a conditional agreement with the U.S.; the U.S. will sell Kenya 12 F-5 jet fighter planes at an estimated cost of $70 million to $75 million. The U.S. Congress must approve the agreement.

KOREA, REPUBLIC OF (South)

June 11—Opposition leader Kim Young Sam, president of the New Democratic party, resigns his party post.

LEBANON

(See also *Intl, Middle East*)

May 8—Parliament elects Elias Sarkis, a banker and civil servant, as President; he is a Christian. 66 members of Parliament voted for Sarkis, 3 abstained, and 29 opposition members boycotted the election.

May 21—Brigadier General Abdel Aziz al-Ahdab announces his resignation.

LIBYA

(See *Intl, Middle East; Iran*)

MALAYSIA

June 6—In the state of Sabah, the Chief Minister and 3 Cabinet members are killed in a plane crash.

MEXICO

(See also *U.S., Foreign Policy*)

May 29—After 5 days of captivity, the daughter of the Belgian ambassador to Mexico is freed by her kidnappers after nearly $400,000 in ransom is paid.

June 6—Under Secretary of External Affairs Jorge Castaneda announces a "Mexicanization of the Gulf" policy; foreign fishing boats will be allowed to fish within 200 miles of the coast only with the government's permission.

MOROCCO

(See *Iran*)

NORWAY

(See *U.S., Foreign Policy*)

PAKISTAN

(See also *India*)

May 26—Prime Minister Zulfikar Ali Bhutto arrives in Peking.

May 27—In Peking, Prime Minister Bhutto meets with Chinese Defense Minister Yeh Chien-ying and Chinese Prime Minister Hua Kuo-feng.

PERU

May 12—4 journalists and 30 other political prisoners are granted amnesty by the government. This is the 2d time amnesty has been granted since the military takeover in August, 1975.

PHILIPPINES, THE

(See *U.S.S.R.*)

POLAND

June 24—The government ends a 5-year freeze on food prices and announces price increases of up to 100 percent.

June 25—Following protest strikes across the country, the government decides to postpone the food price increases. The price freeze will remain in effect indefinitely.

PORTUGAL

(See also *Angola; Indonesia*)

May 6—The government revises its aid program for refugees from Portugal's former African colonies. The refugees continue their protest sit-in in hotels and in front of the government palace.

May 12—The Socialist party announces its support in the June 27 presidential election for army chief of staff General António Ramalho Eanes, an undeclared candidate for President who has the support of the Popular Democratic party and the Center Democratic party.

May 18—The Communist party announces that Octavio Pato will be its candidate for President.

Prime Minister Admiral José Pinheiro de Azevedo confirms his candidacy for the presidency.

June 23—Prime Minister and presidential candidate José Pinheiro de Azevedo has a heart attack.

June 27—Nationwide presidential elections are held.

June 28—Final election results give General António Ramalho Eanes 61 percent of the vote. Major Otelo Saraiva de Carvalho wins 16.5 percent, Prime Minister José Pinheiro de Azevedo wins 14 percent, and Communist party candidate Octavio Pato wins 7.6 percent.

RHODESIA

(See also *U.S., Foreign Policy*)

May 3—The main road leading from Rhodesia to South Africa, closed for 2 weeks, is reopened. Policemen escort motorists along the route to protect them from black nationalist snipers.

May 5—The Ministry of Defense extends to 18 months the term of service in the armed forces. In addition, reservists are being called up for indefinite periods instead of the previous 55-day term.

June 5—The government rescinds a 4-year-old order under which former Prime Minister Garfield Todd has been held under house arrest.

June 10—Defense Minister Pieter van der Byl says that nearly 1,300 guerrillas have entered Rhodesia from neighboring Zambia.

June 12—Government jet fighters bomb a Mozambican army post in retaliation for a rocket and mortar attack.

June 13—Prime Minister Ian D. Smith arrives in South Africa for talks with South African Prime Minister John D. Vorster.

SAUDI ARABIA

(See also *Intl, Middle East, OPEC*)

May 20—In a written interview with *The New York Times*, King Khalid urges the developed nations to maintain current prices on their exports. He implies that his country may otherwise favor an oil price increase.

SEYCHELLES, THE

June 29—The 92 Seychelles Islands in the Indian Ocean, formerly a British colony, become an independent republic. James Mancham becomes President and Albert Rene Prime Minister.

SOUTH AFRICA

(See also *Intl, U.N.; Rhodesia; U.S., Foreign Policy*)

May 19—In an attempt to keep black guerrillas out of the disputed territory of South-West Africa (Namibia), the government plans to create a no-man's land for 1,000 miles along the border with Angola.

May 29—The government terminates negotiations with an American-Dutch consortium; instead, it agrees to purchase a nuclear power plant from France.

June 15—In Soweto, a suburb of Johannesburg, 10,000 black students protest against the use of Afrikaans as the teaching language. When the demonstration turns into a race riot, approximately 6 are killed and 70 are injured.

June 19—Government riot squads end the fighting in the black suburbs; the death toll is estimated at 100, and nearly 1,000 are reported injured.

June 21—Violence flares in the black townships surrounding Pretoria. 10 people are reported killed.

June 23—Prime Minister John Vorster meets with U.S. Secretary of State Henry A. Kissinger in Bedenmais, West Germany. This is the first high-level meeting between representatives of the 2 countries since World War II.

SPAIN

(See also *U.S., Foreign Policy*)

May 7—The Cabinet approves a bill calling for a bicameral legislature in which the entire lower house and most of the Senate would be directly elected; it also approves a bill permitting workers to organize in unions outside the state-run syndicates. Parliament must approve the measures before they take effect.

May 8—King Juan Carlos frees from jail three members of the opposition, who were arrested April 3 after an anti-government rally.

May 14—Following clashes between right-wing and left-wing supporters of Carlist pretender to the throne Prince Carlos Hugo de Borbón-Parma, the government exiles Carlos's brother, Prince Sixto de Borbón-Parma.

May 17—The government denies the National Confederation of Veterans permission to hold a rally in Madrid to commemorate the death of Generalissimo Francisco Franco.

May 25—Parliament approves legislation permitting political meetings and demonstrations; they have been outlawed since the Spanish Civil War in the 1930's.

June 2—In Washington, D.C., King Juan Carlos I and Queen Sofia are received by U.S. President Gerald Ford at the beginning of the King's official visit to the U.S.

une 6—The Popular Socialist party holds an open convention in Madrid, the 1st such meeting permitted since 1939.

une 9—Parliament votes 338 to 91 to legalize political parties. The government retains the right to approve or disapprove of a party's formation.

SWEDEN

une 19—King Gustav marries Silvia Renate Sommerlath, a commoner.

SYRIA

(See also *Intl, Middle East, U.N.; Egypt*)

une 2—In Damascus, Prime Minister Mahmoud al-Ayubi meets with Soviet Prime Minister Aleksei N. Kosygin.

ıne 17—In Paris, President Hafez al-Assad meets with French President Valéry Giscard d'Estaing.

TAIWAN

(See *U.S., Foreign Policy*)

ıne 9—The government announces 9 changes in the Cabinet.

THAILAND

ıne 18—The government announces an agreement with Cambodia. Each country will establish an embassy in the other's capital; the 2 countries also agree on the demarcation of a 10-mile stretch of common border.

ıne 20—The U.S. government closes its last 2 military bases in Thailand—the Ramasun electronic monitoring facility and the U Taphao Air Base.

UGANDA

ıne 10—President Idi Amin survives an assassination attempt; 1 person is killed and 36 are injured.

U.S.S.R.

See also *Intl, Arms Control; Angola; Cuba; Germany (East); Syria; U.S., Foreign Policy*)

[ay 5—Preliminary trade figures for 1975 show a $4.8-billion trade deficit with industrialized Western nations; the overall trade deficit is reported at $3.6 billion.

[ay 8—Communist Party Secretary Leonid I. Brezhnev is promoted to field marshal.

[ay 13—9 Soviet dissidents announce the formation of a watchdog committee to monitor the government's adherence to the human rights provisions of the Helsinki agreements.

ay 14—*Pravda,* the Communist party newspaper, carries an article defending the recent Cuban involvement in Angola and accusing the U.S. of crippling détente by criticizing Cuba.

ay 24—After the U.S. government protests a violation, the government admits a technical violation of the 1972 arms accord.

[ay 30—In Baghdad, Prime Minister Aleksei Kosygin meets with Iraqi Deputy Chairman Saddam Hussein as part of his 4-day trip to the Middle East.

ay 31—In Moscow, at the end of a week-long visit from Angolan Prime Minister Lopo do Nascimento, the government agrees to provide Angola with additional military assistance.

ıne 1—In a move away from collective farming, the Communist party's Central Committee adopts a resolution calling for increased emphasis on specialized agricultural/industrial complexes.

Communist Party Secretary Brezhnev and Philippine President Ferdinand E. Marcos agree to establish diplomatic relations.

June 4—Statistics are released showing that the trade deficit with the West increased for the 1st quarter of 1976; the deficit is reported at $1.7 billion.

June 17—In Moscow, King Hussein of Jordan meets with Soviet leaders.

June 22—Tass, the official press agency, reports the launching of a new Soviet space station into earth orbit.

UNITED KINGDOM

(See also *China; Iceland; Seychelles*)

Great Britain

May 10—Liberal party leader Jeremy Thorpe resigns after a 3-month scandal centering on his financial and sexual life.

May 12—Jo Grimond assumes the leadership of the Liberal party on a caretaker basis.

May 26—Foreign Secretary Anthony Crosland addresses the opening session of the Central Treaty Organization.

June 2—The British pound sterling falls to an all-time low of $1.72.

June 7—The U.S. and 9 other industrialized countries establish $5.3 billion in short-term credit to shore up the pound sterling.

June 16—By a margin of 17 to 1, union leaders vote to limit wage increases to an average of 4.5 percent, with a maximum salary increase of $7.32 per week.

June 24—For the first time in 16 years, a French President pays an official visit. Prime Minister James Callaghan and French President Valéry Giscard d'Estaing agree to meet once a year, alternately in France and Great Britain.

Overseas Territories

BERMUDA

May 19—The white United Bermuda party, the ruling party, wins 26 of the 40 seats in the House; the opposition party, the black Progressive Labor party, wins the remaining 14 seats.

UNITED STATES

Administration

May 5—The Internal Revenue Service releases a report showing that 244 Americans with incomes of more than $200,000 in 1974 paid no federal income taxes in that year; of these, 5 individuals had incomes of more than $1 million. The number and proportion of high-income individuals who pay no federal income taxes rose in 1974.

May 11—The Food and Drug Administration says it will not remove the 7-year-old prohibition on the use of the artificial sugar substitute, cyclamate.

Internal Revenue Commissioner Donald C. Alexander tells the House Subcommittee on Government Information and Individual Rights that he thinks it neither "necessary" nor "desirable" for the IRS to notify some 11,000 individuals and organizations that the IRS improperly audited their tax returns because of their ideologies.

May 17—President Gerald Ford reappoints 5 members of the Federal Election Commission and appoints Representative William Springer (R., Ill.) to fill the vacant post.

May 21—After a 60-day lapse, the reconstituted Federal Election Commission meets for the 1st time and approves over $3.2 million in retroactive matching funds payments to 9 candidates and more than $1 million more to the Democratic and Republican National Committees for nominating convention financing. (See "U.S., Supreme Court," *Current History,* March, 1976, p. 144.)

May 24—In their first transatlantic commercial flight, two Concorde airplanes (SST's, supersonic transports) arrive at Dulles International Airport after flights of less than 4 hours from London and Paris, respectively.

The annual report of the trustees of the Social Security Administration reveals that the deficit this year is estimated at $4.3 billion; the projected deficit was $5.8 billion for this year.

May 25—Recording 129 perceived noise decibels, more than twice the noise level allowed at Kennedy International Airport in New York, the French Concorde leaves Dulles on its return trip to Paris. On a different runway, the British Concorde noise level was not metered.

May 26—It is revealed in Washington, D.C., that Secretary of Defense Donald H. Rumsfeld has intervened in support of the Lockheed Aircraft Corporation to salvage its plan to sell $250-million worth of patrol aircraft to Japan.

May 27—The Federal Election Commission acts to stop the payment of campaign funds to Senator Birch Bayh (D., Ind.), former Senator Fred R. Harris (D., Okla.) and Pennsylvania Governor Milton Shapp and Sargent Shriver, both Democrats, and to stop payments in June to Senator Henry M. Jackson (D., Wash.) and anti-abortion candidate Ellen McCormack. These candidates no longer qualify or will not qualify for federal funds after June 24.

May 28—The Department of Justice says that it has reached a settlement with Mid-America Dairymen, Inc., one of the nation's 3 largest milk-marketing cooperatives, on an anti-trust suit filed in December, 1973.

May 31—The Bureau of the Census reports that if current birth patterns continue about 17 percent of the population will be over the age of 65 by the year 2030.

June 2—According to the text of an interview with President Gerald Ford granted yesterday in Ohio and released today at the White House, the President has asked Attorney General Edward H. Levi to prepare legislation that would keep the courts from "taking over a whole school system, as the courts did in the Boston case and several others"; this would severely limit court-ordered busing to achieve racial school desegregation. The legislation is expected to limit court-ordered busing to specific areas within a community and to prevent such busing if the segregation is caused by "events other than official governmental actions."

June 5—A controversial new earth-fill dam on the upper Snake River in Idaho bursts, leaving 5 known dead, 53 persons missing and more than 30,000 persons homeless in the wake of the flood waters that surged down the river.

June 8—Thomas E. Kauper, head of the anti-trust division of the Justice Department, announces his resignation, effective July 31.

June 14—In a statement read at a White House briefing, President Ford urges legislation providing for the disclosure of bribes paid by U.S. corporations to foreign officials; he terms such bribes a "harm to our foreign relations" and "totally inconsistent with American values."

June 18—In order to monitor the evacuation of American citizens from strife-torn Lebanon, President Gerald Ford cancels a scheduled trip to the Iowa Republican Convention in Des Moines.

June 21—By a 3 to 1 vote, the Nuclear Regulatory Commission approves the export of a nuclear power reactor to Spain.

James E. Smith resigns as Comptroller of the Currency, effective July 31.

June 22—Talcott W. Seelye, a Deputy Assistant Secretar of State, is appointed by President Ford as his specia representative to take charge of the American embassy i Beirut, Lebanon; Seelye replaces Ambassador Francis E Meloy, Jr., who was assassinated in Beirut on June 16.

June 24—In a message to Congress, President Ford propose guidelines limiting court-ordered busing.

June 30—Federal Bureau of Investigation Director Clarenc M. Kelley admits "a limited number" of burglaries b FBI agents in 1972 and 1973.

The President names a 13-member committee chaire by Housing and Urban Development Secretary Carl Hills to study urban problems.

Civil Rights

(See also *Administration; Supreme Court*)

May 14—It is reported in Washington, D.C., that Arm Secretary Martin R. Hoffman has filed 2 affidavits i civil court cases revealing that Army intelligence office in West Berlin have opened 1st class mail between tha city and the U.S.

May 17—Boston's Mayor Kevin H. White asks the Cit Council for a special one-time property tax to raise $27. million to meet the cost of court-ordered busing to achiev racial desegregation in the Boston schools.

May 18—Presidential press secretary Ron Nessen revea that the President has told Attorney General Edward H Levi to ask the Supreme Court to reevaluate the use o busing to achieve racial integration in the nation's publ schools. Levi has been asked to find an "appropriate an proper case."

May 20—Roy Wilkins, executive director of the Nation Association for the Advancement of Colored People, asl the President to meet with civil rights leaders "to discu the school desegregation posture of your administratio and its implication."

May 27—Ron Nessen declares that the President referre incorrectly to the 1954 Supreme Court decision, *Brou v. the Board of Education*, in a news conference la night. Nessen reiterates that "over the years Presider Ford has consistently and firmly stated that he suppor the *Brown* decision."

May 29—Attorney General Edward H. Levi says he will n intervene before the Supreme Court in the Boston scho busing dispute unless the Court decides independently hear the case.

May 30—In Boston, in an apparent protest against Levi decision, store windows are broken and a $75,000 fire "suspicious" origin breaks out.

June 16—In 3 days of hearings ending today in Louisvill Kentucky, the United States Commission on Civil Righ reports serious deficiencies in Louisville's school desegreg tion.

June 28—155 women enter the U.S. Air Force Academ ending the all-male tradition at U.S. military academie in accord with a 1976 law. 38 women enter the Coa Guard Academy.

Economy

May 7—The Department of Labor reports the unemplo ment rate for April unchanged at 7.5 percent.

May 14—The Federal Reserve Board reports that industri production for April was 11.5 percent higher than pr duction in April, 1975; in April, production was 0.7 pe cent over March.

May 17—The Commerce Department's report for the 1 quarter of 1976 does not include a report on a "surplu

or "deficit" in the "official reserve transactions" measure of the U.S. balance of payments; from now on no such calculation is to be made because it is regarded as misleading in view of floating exchange rates.

May 18—The Department of Commerce reports that housing starts declined in April for the 2d consecutive month.

May 21—The Department of Labor reports that the nation's consumer price index rose in April by 0.4 of 1 percent.

May 26—The Department of Commerce reports that the nation's April trade deficit, seasonally adjusted, was $202.1 million in April; the cumulative deficit for 1976 totals $1.07 billion.

May 28—Four major New York City banks raise their prime interest rates from 6¾ to 7 percent; dozens of banks follow their lead.

June 4—The Labor Department reports a climb of only 0.3 percent in the Wholesale Price Index for the month of May.

A group of major banks, including Citibank, announce an increase in their prime lending rate from 7 to 7¼ percent.

The Labor Department reports that the unemployment rate fell to 7.3 percent in May.

June 7—Acting under provisions of the Trade Act of 1974, President Gerald Ford signs documents that will lead to the imposition of import quotas on specialty steels.

June 10—Lockheed Aircraft Corporation announces a new agreement with 24 lending institutions for the overhaul of its financial structure; the company has been heavily in debt.

June 11—The Treasury Department announces annual import quotas of 147,000 tons on specialty steels; the quotas are slightly lower than actual imports in 1974 and 1975.

June 15—Treasury Department officials report that New York City has been asked to submit revised financial plans in order to obtain further federal assistance.

June 16—The Commerce Department reports a deficit of $1.51 billion in the balance of trade for the 1st quarter of 1976.

June 22—The Labor Department reports that the Consumer Price Index rose 0.6 percent in May, up 6.2 percent over last May.

Foreign Policy

(See also *Intl, Arms Control; Iran; Kenya*)

May 1—In Senegal, Secretary of State Henry Kissinger suggests a $7.5-billion international program to "roll back the desert," develop additional water resources, and increase crop acreage in West Africa.

May 6—At the U.N. Conference on Trade and Development in Nairobi, Kissinger suggests the establishment of an International Resources Bank to "promote more rational, systematic and equitable development of resources in developing nations," with the money for the bank to be raised by the industrialized and oil-producing nations.

May 9—Representative Les Aspin (D., Wis.) makes public a Central Intelligence Agency report revealing that the U.S. has outspent the U.S.S.R. almost 2 to 1 in the building of major warships during the last 5 years, spending $4.9 billion versus the Soviet expenditure of $2.5 billion.

May 13—The U.S. embassay in Pretoria, South Africa, "strongly" advises U.S. citizens against travel to or within Rhodesia; it warns Americans in Rhodesia to make "contingency plans" for departing.

May 16—In Cancun, Mexico, Treasury Secretary William E. Simon says he plans to urge Congress to continue economic aid to Chile without further reduction, because the head of the Chilean junta, General Augusto Pinochet, has told him that conditions for political prisoners in Chile will be improved.

The Senate Foreign Relations Committee votes 11 to 2 to approve a 5-year Treaty of Friendship and Cooperation with Spain that provides $1.2 billion in U.S. aid to Spain in return for the continuing U.S. use of Spanish bases.

May 17—French President Valéry Giscard d'Estaing arrives in Washington, D.C., for a state visit.

May 18—Giscard d'Estaing addresses a joint session of Congress.

May 22—In Oslo for a meeting of NATO foreign ministers, Kissinger discusses with Norwegian leaders Norway's claims to Barents Sea oil.

May 25—In a letter to the Senate Foreign Relations Committee, the President supports Senate efforts to give an additional $85 million in aid to the nations of black southern Africa.

May 30—A study prepared by the Congressional Budget Office reveals that in 1975 the U.S. sold arms overseas valued at $8 billion, saving the Defense Department about $560 million.

June 5—Secretary of State Kissinger opens his 8-day trip to Latin America in Santo Domingo, Dominican Republic; he appeals for the preservation of human rights.

June 12—U.S. delegate to the United Nations William W. Scranton leaves on a 3-week tour of African countries.

June 13—Kissinger ends 3 days of talks with Mexican President Luis Echeverría and returns to Washington.

June 15—U.S. Secretary of Defense Donald Rumsfeld flies to Nairobi, Kenya, for talks with African leaders in Kenya and Zaire.

June 17—Arriving in Kinshasa, Zaire, Rumsfeld says that the U.S. is strongly opposed to foreign intervention in Africa.

June 18—The U.S. embassy in Beirut, Lebanon, urges all American citizens to leave the strife-torn country.

June 24—Ron Nessen says that the U.S. has withdrawn its small military advisory teams from the Chinese Nationalist-controlled islands of Quemoy and Matsu, just off the coast of China.

June 26—President Ford arrives in Puerto Rico to convene a 2-day, 7-nation economic conference. At the San Juan airport, the President cautions Cuba on acts of "intervention" in U.S.-Puerto Rican relations.

Labor and Industry

May 7—In Richmond, Virginia, a federal grand jury indicts the Allied Chemical Corporation on 1,095 criminal charges for discharging the ant poison Kepone into the James River; the poison has led to the closing of a multimillion dollar fishing industry.

May 10—Teamsters Union president Frank Fitzsimmons announces that union members voting 4 to 1 in a mail referendum have accepted a new national master freight agreement.

The Securities and Exchange Commission brings suit against the General Tire and Rubber Company for illegal campaign contributions, bribes overseas, unrecorded slush funds, misleading reports, and participation in the Arab boycott against Israel.

May 18—The Labor Department clears top officers of the United Mine Workers of charges of mismanaging the union's finances.

May 27—An official of the International Ladies Garment Workers' Union announces that employers and the garment workers' union have agreed to wage increases of 23 percent over the next 3 years.

A spokesman for Pennsylvania Governor Milton Shapp announces that the German automaker Volkswagen will establish its 1st U.S. assembly plant near New Stanton, Pa.

June 28—Retroactive to 1965, the Internal Revenue Service revokes the tax-exempt status of the Teamsters Union's $1.4 billion Central States Pension Fund because of alleged mismanagement and questionable loan practices.

Legislation

May 3—The House of Representatives votes 291 to 81 to reconstitute the Federal Election Commission; it is disclosed that on April 30 Thomas B. Curtis, the chairman of the commission, resigned.

May 4—The Senate votes 62 to 29 to approve the reconstituted Federal Election Commission.

The House votes 301 to 101 to override the President's veto of a child day-care center bill. This was the President's 48th veto.

May 5—The Senate fails to override the veto of the child day-care centers by 3 votes.

May 7—Saying that it would impose "unprecedented restrictions," President Ford vetoes the $4.4-billion foreign aid bill for fiscal 1976 and July, August and September, 1976. Pursuant to a 1976 law, the 1977 fiscal year starts October 1, 1976, instead of July 1.

May 11—The President signs the law revising the Federal Election Commission, thus allowing the commission to pay $2 million in subsidies to candidates in the presidential primaries.

The President signs legislation restoring the White House Office of Science and Technology.

May 12—The President signs legislation enlarging the authority of the Consumer Product Safety Commission.

May 13—President Ford asks for $64.3 million in supplemental appropriations to carry out provisions of a still unratified new treaty with Spain.

The President suggests that Congress should establish a mandatory 4-year schedule for approving the reform of federal regulatory agencies.

The House votes 224 to 170 to complete congressional action approving a $413.3-billion federal budget target for fiscal 1977, the year beginning October 1.

May 19—The Senate votes 72 to 22 to establish a permanent 15-member Select Committee on Intelligence to supervise the operations of the Central Intelligence Agency.

May 20—The Senate votes 44 to 37 to postpone appropriations for the B-1 bomber until February 1, 1977.

May 24—The Senate votes 37 to 33 to reject the President's nomination of S. John Byington as chairman of the Consumer Product Safety Commission.

May 26—After reconsideration, the Senate votes 49 to 39 to confirm Byington as a member of the Consumer Product Safety Commission.

May 28—A bill establishing the broad authority of the Food and Drug Administration over the efficacy and safety of some $2.8 billion worth of medical devices is signed by the President.

June 5—Speaker of the House of Representatives for the last 5½ years Carl B. Albert (D., Okla.) announces that he will retire when his current term expires at the end of 1976; he will not seek reelection to the House of Representatives.

June 16—President Ford signs a bill requiring the Labor and Commerce Departments and the Office of Management and Budget to provide the necessary additional data "to promote the improvement and expansion of social and economic statistics relating to Americans of Spanish origins."

June 19—President Ford asks Congress to approve a U.S.-Turkish agreement that would permit the reopening of U.S. military bases in Turkey.

June 21—The House of Representatives accepts the resignation of Representative Wayne L. Hays (D., Ohio) as chairman of the House Administration Committee; Hays has been involved in a Capitol Hill sex scandal. (See also *Political Scandal.*)

June 23—A report of the Senate Select Committee on Intelligence issued today says that both the Federal Bureau of Investigation and the Central Intelligence Agency were lax in their investigations and reports about the assassination of President John Kennedy in 1963.

By a 328-to-83 vote, the House passes a revised version of a public works bill whose primary purpose is to provide jobs; the Senate passed the bill 70 to 25 last week; the bill now goes to President Ford, who vetoed a similar measure in February.

June 29—The House completes congressional action on a 60-day extension of the temporary reductions in income tax withholding rates.

June 30—The President signs the 60-day tax cut extension bill.

Congress passes a bill extending the life of the Federal Energy Commission 1 month.

Political Scandal

May 17—In Washington, D.C., a U.S. Court of Appeals unanimously confirms the conviction of one-time presidential aide John D. Ehrlichman for conspiring in 1971 to violate the civil rights of psychiatrist Lewis J. Fielding in an effort to rob him of confidential records on Daniel Ellsberg. Ehrlichman was President Richard Nixon's chief domestic adviser at the time of the break-in of the psychiatrist's office.

May 18—A Senate intelligence committee staff report states that Presidents Lyndon Johnson and Richard Nixon applied pressure on the CIA to force the agency into a domestic spy operation, Operation Chaos, despite the fact that CIA director Richard Helms knew that the operation was illegal.

May 21—In testimony released today in Washington, D.C., Kissinger claims that his role in wiretapping 17 government employees and newsmen from 1969 to 1971 was "substantially passive."

May 27—Three executives of R. J. Reynolds Industries resign in the wake of a company disclosure that the company illegally diverted between $65,000 and $90,000 in company funds for domestic political contributions.

June 1—In U.S. District Court in Baltimore, a federal grand jury returns an indictment charging 7 independent oil companies with illegally fixing gasoline prices in the Middle Atlantic states.

June 3—Representative Wayne L. Hays (D., Ohio) agrees to give up the chairmanship of the Democratic National Congressional Committee during investigations into charges that he maintained Elizabeth Ray as his mistress at government expense. Hays admits that he had "an affair" with Ray.

June 6—A study prepared for the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities charges that over the last 30 years the Central Intelligence Agency has failed to fulfill essential missions in at least 3 areas because of a growing bureaucracy and because of conflicting interests including the agency's covert activities.

June 7—The Firestone Tire & Rubber Company reports that it paid about $330,000 in illegal political contributions over a 2½ year period; it also disbursed additional sums abroad.

Politics

May 1—In Seattle, Democratic Senator Henry Jackson (D., Wash.) says he is "ending my active pursuit" of the Democratic presidential nomination.

Maine's Republicans elect 20 uncommitted delegates to the Republican National Convention.

Louisiana Democrats elect 22 of their 41 delegates to the national convention, 13 for former Georgia Governor Jimmy Carter and 9 for Senator Frank Church of Idaho.

May 2—Final results in the May 1 Texas primary reveal that former California Governor Ronald Reagan has defeated President Gerald Ford, winning all 96 delegates; Jimmy Carter leads Texas Senator Lloyd M. Bentsen, winning 92 of the 98 Democratic delegates.

May 3—In a sampling of precincts in Colorado, Jimmy Carter appears to have made a strong showing in Democratic delegate caucuses; no official count is made in Republican delegate caucuses but a sample of 175 Denver precincts reveals that President Ford has won 58 percent of the vote, compared to 42 percent for Ronald Reagan.

May 4—In Georgia's nonbinding Democratic presidential preference primary, Carter defeats Alabama Governor George Wallace and Arizona Representative Morris K. Udall. In a binding Republican vote for 48 Republican delegates, Reagan defeats President Ford.

In Indiana, Carter wins the Democratic primary; Reagan defeats President Ford in the Republican primary.

In Washington, D.C., Jimmy Carter wins a plurality of the 13 delegates to the Democratic National Convention.

May 5—In Alabama, the Democratic presidential primary held yesterday is inconclusive; run-off elections are scheduled for May 25.

May 11—Carter wins the Democratic presidential primary in Connecticut by a narrow margin.

In Nebraska, Reagan defeats Ford in the Republican primary; Frank Church defeats Carter in the Democratic primary.

May 13—Speaking at the United Nations at a privately sponsored conference, Carter urges a voluntary all-nation moratorium on the purchase or sale of nuclear fuel enrichment and reprocessing plants, to try to limit the spread of nuclear weapons.

May 15—Reagan wins 18 delegate votes in Oklahoma, 12 in Missouri and 2 in Virginia.

Carter wins 8 delegate votes in New Mexico.

May 18—President Ford defeats Reagan in the Michigan Republican presidential primary.

Carter narrowly wins the Democratic primary in Michigan, with 44 percent of the vote to Udall's 43 percent.

In Maryland, President Ford defeats Reagan with 58 percent of the vote; he wins all 43 delegates. California Governor Edmund G. Brown, Jr., defeats Carter in Maryland, winning 49 percent to Carter's 37 percent.

May 24—In a closed meeting, 119 New York Republican delegates vote to support President Ford for the Republican presidential nomination.

May 25—In primary elections in Arkansas, Reagan defeats the President, 63 percent to 36 percent; Carter wins 63 percent of the Democratic primary vote.

In Idaho, Reagan wins 74 percent of the vote compared to 25 percent for the President; Church wins 80 percent of the Democratic vote.

In Kentucky, the President wins 51 percent to Reagan's 47 percent; Carter takes 59 percent of the Democratic vote.

In Nevada, Reagan takes 66 percent of the vote, the President takes 29 percent; California Governor Edmund G. Brown, Jr., defeats Carter, winning 53 percent of the Democratic vote.

In Oregon, the President defeats Reagan, winning 52 percent of the vote; Church wins the Democratic primary, with 35 percent of the vote.

In Tennessee, the President wins 50 percent of the vote to Reagan's 49 percent; Carter wins 78 percent of the Democratic vote.

May 30—In Hawaii, 15 uncommitted delegates are elected by the Democrats; 1 is committed to Morris K. Udall; 1 is said to support Henry Jackson.

At the Iowa Democratic convention, 3 delegates who support Carter are selected; 2 are committed to Udall.

June 1—In yesterday's primaries in Rhode Island, President Ford wins 66 percent of the Republican vote; Reagan wins 31 percent. Carter wins 30 percent of the Democratic vote; Church wins 28 percent.

In South Dakota, Reagan wins 51 percent of the Republican vote; the President wins 44 percent. Carter wins 41 percent of the Democratic vote.

In Montana, Reagan wins 63 percent of the Republican vote; the President wins 35 percent. Church wins 60 percent of the Democratic vote; Carter wins 25 percent. The other Democratic candidates trail badly in all 3 states.

June 3—Former Minnesota Governor Harold Stassen announces that he will be a candidate for the Republican presidential nomination.

June 8—In primaries in Ohio and New Jersey, President Ford defeats Reagan for the Republican nomination; Reagan defeats Ford decisively in California. Brown defeats Carter in California; in New Jersey, an uncommitted delegation backs Brown. Carter wins the primary in Ohio.

June 9—Members of the Democratic National Congressional Committee unanimously name James C. Corman (D., Cal.) as chairman of the committee, replacing Wayne Hays.

June 12—Reagan takes 18 of 19 at-large Republican delegates in Missouri.

June 13—The drafting subcommittee of the Democratic Platform Committee completes work on the party's platform; the platform calls for more cooperation with the U.S.S.R. and reduction in the military budget along with a strong military deterrent.

June 14—Senator Church withdraws as a candidate for the Democratic presidential nomination and endorses Carter.

Udall concedes to Carter, ending active campaigning; he does not officially withdraw his candidacy.

June 24—In an address before the Foreign Policy Association in New York City, Carter says "the time has come for a new architectural effort, with a growing cooperation among the industrial democracies its cornerstone, and with peace and justice its constant goals."

June 26—President Ford wins 17 of 18 delegates at Minnesota's Republican convention.

June 30—Senator Barry Goldwater (R., Ariz.) formally endorses the President for the Republican presidential nomination.

Supreme Court

May 3—The Supreme Court rules 6 to 2 that it is not unconstitutional to try a defendant in prison uniform unless he specifically objects to being tried in prison clothing.

May 19—The Court rules 8 to 0 that the Federal Power Commission's power to act in cases of job discrimination in companies it regulates is limited.

The Court reverses a 5th circuit court ruling that suspects called to testify before grand juries must have the same rights to have a lawyer and to remain silent—the so-called Miranda warnings—that are given to suspects in police custody.

June 1—By a 5-to-4 vote, the Supreme Court rules that the Civil Service Commission may not bar resident aliens from federal Civil Service jobs.

June 7—By a 7-to-2 vote, the Court rules that a statute or official act is not unconstitutional because such an act places a "substantially disproportionate burden on one race"; proof of "racially discriminatory purpose" is also necessary.

June 14—The Court refuses without comment to review the court-ordered desegregation plan for Boston's public schools; federal Judge W. Arthur Garrity's order of over a year ago will remain in effect.

In a unanimous decision, the Court holds that Public Law 280, giving various states criminal and civil jurisdiction over Indian reservations, does not give the states power to tax reservation Indians.

In an 8-to-0 ruling, the Court says that businesses need disclose only that proxy information to stock-holders which "there is a substantial likelihood that a reasonable shareholder would consider . . . important in deciding how to vote."

June 17—The Supreme Court unanimously rules that the President has the authority to impose fees on imported oil as a means of limiting imports for reasons of national security.

June 18—Basing its decision on the 1966 Miranda case, the Court rules 6 to 3 that the "Miranda warnings" of a defendant's right to remain silent under questioning carry an "implicit" assurance that the prosecutor may not cross-examine the defendant at trial as to why the defendant did not relate an exculpatory story upon arrest.

June 21—In a 5-to-4 ruling, but with no majority opinion, the Court rules that state funds may go to church-affiliated colleges and universities, to be used for nonsectarian purposes, even when religion is a mandatory subject and when prayers are said at the start of classes.

The Court rules 6 to 3 that a city may require property owners seeking rezoning to secure the prior approval of the city's voters in a referendum.

June 24—By a 5-to-4 vote, the Court invalidates a 1974 law that extended federal minimum wage and maximum hour provisions to state and municipal employees.

By a 5-to-4 vote, the Supreme Court rules that cities may back zoning ordinances with criminal penalties to restrict the proliferation of so-called "adult" movie theaters.

June 25—The Supreme Court rules 7 to 2 that private nonsectarian schools may not exclude applicants because of race.

By a 7-to-2 margin, the Court rules that the curren version of the Civil Rights Act of 1866 protects white against racial discrimination to the same degree it pro tects blacks. In a unanimous decision, the Court als rules that Title VII of the Civil Rights Act of 196 prohibits discrimination by employers against whites jus as it prohibits discrimination against blacks.

June 28—In a unanimous ruling, the Court holds that a state must award back pay and pay attorneys' fees if i has been found to discriminate against an employee. Th case involves the state of Connecticut.

The Court rules 6 to 2 that once court-ordered plan for school desegregation become effective, the court can not require school officials to revise attendance zone yearly if the population's racial pattern shifts.

In a case involving Chicago, the Court rules 5 to that politicians who win elections may not fire governmen office workers for their political beliefs unless the worker hold policy-making or confidential advisory posts.

June 29—The Court rules 7 to 2 that the fifth amendmen guarantee against self-incrimination does not prevent th seizure of private business papers and their use as evidenc against their owner in a criminal trial.

The Court rules 6 to 3 that the Social Security Ac is constitutional in its provision that certain categories o illegitimate children must prove their dependency on th deceased parent to become eligible for survivor's benefits

June 30—The Court rules unanimously that the first amend ment guarantee of a free press was violated in 1975 whe a Nebraska judge forbade journalists to report details o a murder trial. A judicial gag rule is ruled unconstitu tional in most cases.

The Court rules 5 to 4 that a state may refuse a crim inal defendant an initial jury trial if he can obtain a jur trial on appeal.

URUGUAY

June 12—The armed forces remove President Juan Marí Bordaberry from office. Vice President Alberto Demi cheli will act as interim President.

VIETNAM

May 2—Government officials announce that effective Ma 8 Hanoi will become the diplomatic, publishing and inte national center of the country. Press offices and emba sies in Saigon will be closed.

May 24—In Rome, Pope Paul VI installs the archbisho of Hanoi as a cardinal.

June 24—In Hanoi, the National Assembly of a reunite Vietnam holds its first session in 30 years.

YUGOSLAVIA

June 25—President Josip Broz-Tito decides to attend th European Communist Conference in East Berlin. For th past 19 years he has boycotted international Communi conferences.

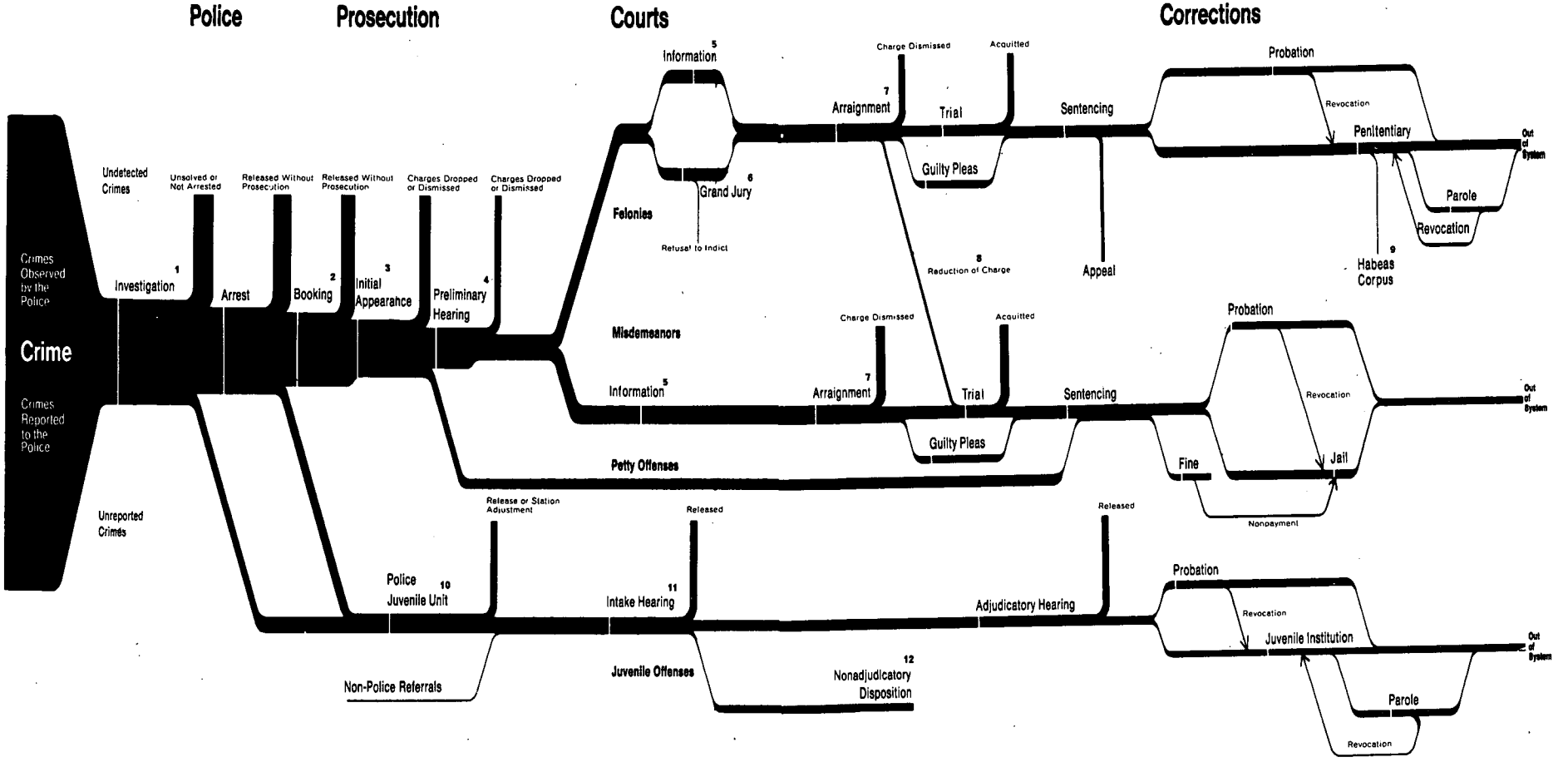
ZAMBIA

May 28—Prime Minister Kenneth Kaunda says that he wi permit black nationalist guerrillas to use his country as base for attacks against Rhodesia.

June 13—In Lusaka, the main post office and the hig court building are damaged by bombs. President Kaund accuses Rhodesian rebels of the bombing.

A General View of the Criminal Justice System

This chart seeks to present a simple yet comprehensive view of the movement of cases through the criminal justice system. Procedures in individual jurisdictions may vary from the pattern shown here. The differing weights of line indicate the relative volumes of cases disposed of at various points in the system, but this is only suggestive since no nationwide data of this sort exists.



1 May continue until trial.

2 Administrative record of arrest. First step at which temporary release on bail may be available.

3 Before magistrate, commissioner, or justice of peace. Formal notice of charge, advice of rights. Bail set. Summary trials for petty offenses usually conducted here without further processing.

4 Preliminary testing of evidence against defendant. Charge may be reduced. No separate preliminary hearing for misdemeanors in some systems.

5 Charge filed by prosecutor on basis of information submitted by police or citizens. Alternative to grand jury indictment; often used in felonies, almost always in misdemeanors.

6 Reviews whether Government evidence sufficient to justify trial. Some States have no grand jury system; others seldom use it.

7 Appearance for plea; defendant elects trial by judge or jury (if available); counsel for indigent usually appointed here in felonies. Often not at all in other cases.

8 Charge may be reduced at any time prior to trial in return for plea of guilty or for other reasons.

9 Challenge on constitutional grounds to legality of detention. May be sought at any point in process.

10 Police often hold informal hearings, dismiss or adjust many cases without further processing.

11 Probation officer decides desirability of further court action.

12 Welfare agency, social services, counselling, medical care, etc., for cases where adjudicatory handling not needed.

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